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18
19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SAN MATEO

21 SIX4THREE, LLC, a Delaware limited liability
22 company,

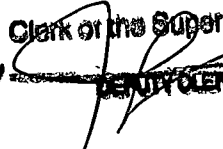
23 Plaintiff,

24 v.

25 FACEBOOK, INC., a Delaware corporation;
26 MARK ZUCKERBERG, an individual;
27 CHRISTOPHER COX, an individual;
28 JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

FILED
SAN MATEO COUNTY
MAY 08 2019

Clerk of the Superior Court
by  CLERK

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**DECLARATION OF CATHERINE Y. KIM IN
SUPPORT OF DEFENDANT FACEBOOK,
INC.'S OPPOSITION TO BIRNBAUM &
GODKIN, LLP'S EX PARTE APPLICATION
TO STAY DISCOVERY**

Date: May 10, 2019
Time: 9:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

CIV533328
D10
Declaration in Opposition
1808891



1 I, Catherine Y. Kim, declare as follows:

2 1. I am a lawyer with the law firm Durie Tangri LLP, counsel of record for Defendant
3 Facebook, Inc. ("Facebook") in the above-captioned matter. I provide this declaration in support of
4 Facebook's Opposition to Birnbaum & Godkin, LLP's Ex Parte Application to Stay Discovery. I declare
5 that the following statements are true to the best of my knowledge, information, and belief, formed after
6 a reasonable inquiry under the circumstances. If called upon to testify, I could and would competently
7 testify thereto.

8 2. Attached hereto as **Exhibit 1** is a true and correct copy of the Petition for Peremptory Writ
9 of Prohibition filed with the California Court of Appeal in *Birnbaum & Godkin, LLP v. Superior Court*
10 (*Facebook, Inc.*), Case No. A156945, on April 10, 2019.

11 3. Attached hereto as **Exhibit 2** is a true and correct copy of the Reporter's Transcript of
12 Proceedings, taken in this matter on March 13, 2019.

13 4. Attached hereto as **Exhibit 3** is a true and correct copy of the Memorandum of Points and
14 Authorities in Support of Birnbaum & Godkin, LLP's Motion to Be Relieved as Counsel for Plaintiff
15 Six4Three, LLC, filed in this matter on January 8, 2019.

16 5. Attached hereto as **Exhibit 4** is a true and correct copy of the Ex Parte Application to Stay
17 Discovery, filed in this matter on March 27, 2019.

18 6. Attached hereto as **Exhibit 5** is a true and correct copy of Plaintiff's Ex Parte Application
19 for Order Continuing Hearing Date, filed in this matter on January 17, 2019.

20 7. Attached hereto as **Exhibit 6** is a true and correct copy of Facebook's Discovery Letter
21 Brief, submitted to the Court in this matter on May 2, 2019.

22 8. Attached hereto as **Exhibit 7** is a true and correct copy of the Reporter's Transcript of
23 Proceedings, taken in this matter on November 30, 2018.

24 9. Attached hereto as **Exhibit 8** is a true and correct copy of a letter from Jack Russo to
25 Sonal N. Mehta with an attached draft Stipulation Regarding Hearing Dates on Pending and Potential
26 Motions dated December 22, 2018.

27 10. Attached hereto as **Exhibit 9** is a true and correct copy of the Declaration of Theodore
28 Kramer regarding Plaintiff Six4Three's Conditional Acceptance of Birnbaum & Godkin and Gross &

1 Klein's Motion to Be Relieved as Counsel for Plaintiff Six4Three, LLC, filed in this matter on January
2 24, 2019.

3 11. Attached hereto as **Exhibit 10** is a true and correct copy of Defendant Facebook, Inc.'s
4 Supplemental Opposition to the Declaration of Theodore Kramer, filed in this matter on January 31,
5 2019.

6 12. Attached hereto as **Exhibit 11** is a true and correct copy of Defendant Facebook, Inc.'s
7 Opposition to Birnbaum & Godkin, LLP and Gross & Klein LLP's Motion to Be Relieved as Counsel for
8 Plaintiff Six4Three, LLC, filed in this matter on January 17, 2019.

9 13. Attached hereto as **Exhibit 12** is a true and correct copy of the Opposition to Facebook's
10 Motion to Open Discovery and to Compel, filed in this matter on February 27, 2019.

11 14. Attached hereto as **Exhibit 13** is a true and correct copy of Birnbaum & Godkin, LLP and
12 David S. Godkin's Discovery Letter Brief, filed in this matter on May 2, 2019.

13 15. Attached hereto as **Exhibit 14** is a true and correct copy of an email from Department 23
14 of the San Mateo County Superior Court to counsel herein, dated May 2, 2019.

15 16. Attached hereto as **Exhibit 15** is a true and correct copy of Notice of Motion and Motion
16 to Be Relieved as Counsel filed by Gross & Klein LLP, in this matter on January 8, 2019.

17 17. Attached hereto as **Exhibit 16** is a true and correct copy of Notice of Motion and Motion
18 to Be Relieved as Counsel filed by Birnbaum & Godkin, LLP, in this matter on January 8, 2019.

19 18. Attached hereto as **Exhibit 17** is a true and correct copy of the Orders Granting Attorneys'
20 Motions to Be Relieved as Counsel, issued in this matter on April 30, 2019.

21 19. Mr. Godkin of Birnbaum & Godkin attended the March 15, 2019 hearing on Facebook's
22 motion to open discovery and to compel telephonically, and Mr. Gross of Gross & Klein attended the
23 hearing in person.

24 20. Attached hereto as **Exhibit 18** is a true and correct copy of a letter from Damian Collins,
25 M.P., to Theodore Kramer, dated November 19, 2018. This document was previously submitted as part
26 of Exhibit 7 to the Declaration of Laura E. Miller in Support of Defendant Facebook, Inc.'s Brief re
27 Court's Order dated November 20, 2018, filed in this matter on November 28, 2018.

1 21. Attached hereto as **Exhibit 19** is a true and correct copy of a letter from Damian Collins,
2 M.P., to Theodore Kramer, dated November 21, 2018. This document was previously submitted as
3 Exhibit 5 to the Declaration of Laura E. Miller in Support of Defendant Facebook, Inc.'s Brief re Court's
4 Order dated November 20, 2018, filed in this matter on November 28, 2018.

5 22. Attached hereto as **Exhibit 20** is a true and correct copy of Defendant Facebook, Inc.'s
6 Brief re Court's Order dated November 20, 2018, filed in this matter on November 28, 2018.

7 23. Attached hereto as **Exhibit 21** is a true and correct copy of the Declaration of Richard
8 Gordon, Queen's Counsel, dated November 28, 2018. This document was previously submitted as
9 Exhibit 1 to the Declaration of Laura E. Miller in Support of Defendant Facebook, Inc.'s Brief re Court's
10 Order dated November 20, 2018, filed in this matter on November 28, 2018.

11 I declare under the penalty of perjury under the laws of the State of California that the foregoing
12 is true and correct. Executed on this 7th day of May, 2019.

13
14 

15 _____
16 CATHERINE Y. KIM
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1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On May 8, 2019, I served the following documents in the manner described below:

6 **DECLARATION OF CATHERINE Y. KIM IN SUPPORT OF DEFENDANT**
7 **FACEBOOK, INC.'S OPPOSITION TO BIRNBAUM & GODKIN, LLP'S EX PARTE**
8 **APPLICATION TO STAY DISCOVERY**

9 ☒ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier,
and/or process server for hand delivery on this date.

10 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
11 Durie Tangri's electronic mail system from cortega@durietangri.com to the email
addresses set forth below.

12 On the following part(ies) in this action:

13 **VIA MESSENGER SERVICE**
14 **AND EMAIL**

15 Theodore Kramer
1267 Chestnut St., Apt. 6
San Francisco, CA 94109
ted@six4three.com

16 *Agent for Service of Process for*
17 *Six4Three, LLC*

18 **VIA EMAIL ONLY**

19 Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
20 San Francisco, CA 94111
sgross@grosskleinlaw.com

21 **VIA EMAIL ONLY**

22 David S. Godkin
James Kruzer
23 BIRNBAUM & GODKIN, LLP
280 Summer Street
24 Boston, MA 02210
godkin@birnbaumgodkin.com
25 kruzer@birnbaumgodkin.com

13 **VIA EMAIL ONLY**

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Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)

21 **VIA EMAIL ONLY**

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Attorney for Birnbaum & Godkin, LLP

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4 Wilson Elser
5 525 Market Street, 17th Floor
6 San Francisco, CA 94105
7 donald.sullivan@wilsonelser.com
8 Joyce.Vialpando@wilsonelser.com
9 Dea.Palumbo@wilsonelser.com

10 *Attorney for Gross & Klein LLP*

11 I declare under penalty of perjury under the laws of the United States of America that the
12 foregoing is true and correct. Executed on May 8, 2019, at San Francisco, California.
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28


Christina Ortega

EXHIBIT 1

IMMEDIATE STAY REQUESTED
CIVIL COURT OF APPEAL CASE NO. _____
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

BIRNBAUM & GODKIN, LLP, GROSS & KLEIN, LLP,

Petitioners,

v.

**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO,**

Respondent;

FACEBOOK, INC., et al.,

Defendants and Real Party in Interest.

FROM THE SUPERIOR COURT, COUNTY OF SAN MATEO,

CASE No. CIV 533328

Honorable V. Raymond Swope, (650) 261-5123

**PETITION FOR PEREMPTORY WRIT OF PROHIBITION OR OTHER
APPROPRIATE RELIEF, AND REQUEST FOR IMMEDIATE STAY;
MEMORANDUM OF POINTS AND AUTHORITIES; [SUPPORTING
EXHIBITS FILED CONCURRENTLY HEREWITH]**

James A. Murphy – 062223

JMurphy@mpbf.com

Kristin L. Iversen – 286787

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*Attorneys for Petitioner and Third
Parties*

GROSS & KLEIN LLP

State of California
Court of Appeal
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: _____
Superior Court Case Number: CIV 533328

Appellant/Petitioner: Birnbaum & Godkin, LLP

Respondent/Real Party in Interest:

This Certificate is submitted on behalf of the following party:

BIRNBAUM & GODKIN, LLP

(Check if applicable):

☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

☒ Interested entities or persons required to be listed under rule 8.208:

Full Name of Interested Entity or Person	Nature of Interest (Explain):
1. _____	Defendant
2. _____	Defendant
3. _____	Defendant
4. _____	Defendant
5. _____	Defendant
6. _____	Defendant
7. _____	Plaintiff

Attorney Name: James A. Murphy
State Bar No.: 062223
Firm Name, MURPHY, PEARSON, BRADLEY & FEENEY
Address and 88 Kearny Street, 10th Floor
Phone: San Francisco, CA 94108-5530
Telephone: (415) 788-1900
Facsimile: (415) 393-8087

Party Represented: Birnbaum & Godkin, LLP, Petitioner
Date: April 10, 2019 /s/ James A. Murphy

Signature of Attorney or Party

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE
JUSTICES OF THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA FOR THE FIRST APPELLATE DISTRICT:

In this timely, verified petition, Petitioners Birnbaum & Godkin, LLP and Gross & Klein, LLP ("Petitioners"), whose client is Plaintiff Six4Three, LLC ("Six4Three"), seek a peremptory writ of mandate, prohibition, or other extraordinary writ to compel respondent, the Superior Court of San Mateo County, to stay this action, specifically any orders of the Superior Court that require Petitioners to perform legal services on behalf of their client, Six4Three or related to Six4Three, while their motions to be relieved as counsel for Six4Three are under submission by the Superior Court. The Superior Court's decision on the motions to be relieved as counsel because of a conflict of interest are due by June 11, 2019. The Superior Court denied Petitioners' request to stay the proceedings, including the requirement to represent Six4Three in connection with reopened discovery, pending the Superior Court's ruling on Petitioners' motions to be relieved as counsel. Tellingly, Petitioners' client, Six4Three, did not oppose the motions to be relieved as counsel. Facebook was the only party to oppose the motions. Petitioners have an unwaivable conflict of interest in their representation of Six4Three that mandates withdrawal as counsel, and as long as Petitioners are required to remain as attorney of record for Six4Three, they taint the

proceedings below and prejudice Six4Three's ability to mount an effective prosecution in the court below.

A writ of mandate or other stay order should therefore issue to stay the proceedings below while this Court addresses whether the Superior Court should have granted Petitioners' request for stay of the proceedings while the Petitioners' motions to be relieved as counsel are under submission by the Superior Court. Petitioners seek an order staying this action, including all discovery directed to them or Six4Three, until the Superior Court rules on Petitioners' motions to be relieved as counsel, which were taken under submission by the Superior Court on March 13, 2019.

**PETITION FOR WRIT OF MANDATE, PROHIBITION OR
OTHER APPROPRIATE STAY ORDER**

I. The Parties

1. Petitioners Birnbaum & Godkin, LLP ("B&G") and Gross & Klein, LLP ("G&K"); collectively "Counsel" or "Petitioners") are counsel of record for Plaintiff Six4Three, LLC ("Six4Three") in an action pending in Respondent Superior Court of the State of California for the County of San Mateo ("Superior Court"), entitled *Six4Three, LLC, a Delaware Limited Liability Company v. Facebook, Inc., a Delaware Corporation, Mark Zuckerberg, an individual, Christopher Cox, an individual, Javier Olivan, an individual, Samuel Lessin, an individual, Michael Vernal, an individual, Ilya Sukhar, an individual, and Does 1-50, inclusive*, Case No. CIV533328.

2. Real Parties in Interest Facebook, Inc. (“Facebook”), Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal and Ilya Sukhar (collectively “Defendants”) are the defendants named in the action described above.

3. Respondent Superior Court is now and at all times mentioned in this Petition, has been a court exercising judicial functions in connection with the action described above.

II. Timeliness Of Petition

4. The Superior Court took Petitioners’ motions to be relieved as counsel under submission on March 13, 2019. The Minute Order from the hearing states that the Superior Court’s decision is due on June 11, 2019, thus establishing that the Superior Court recognized its ability take substantial time to issue a decision on the motions.

5. The Superior Court issued its order granting in part and denying in part, Facebook’s Motion to Open Discovery and to Compel (“Motion to Open Discovery”) on March 15, 2019 (Petitioners’ Appendix (“PA”), 000527 to 000546.) Thus, while Petitioners’ motions to be relieved as counsel based on an unwaivable conflict were under submission, the Superior Court reopened discovery in the action, while it was stayed pending the appeal of the Superior Court’s rulings on anti-SLAPP motions. The Superior Court’s order on Facebook’s Motion to Open Discovery forces Petitioners to continue to represent Six4Three, even though they are

conflicted and cannot do so ethically, and effectively forces Petitioners to violate Rule 1.16(a)(2) of the California Rules of Professional Conduct.

6. On March 27, 2019, Petitioners filed an Ex Parte Application to Stay Discovery pursuant to the March 15th order granting, in part, and denying, in part, Facebook's Motion to Open Discovery pending the Superior Court's decision on Petitioners' motion to withdraw as counsel for Six4Three. (PA 000549-000558.) On April 2, 2019, the Superior Court denied the ex parte application. (PA 000640- 000643.) Although Petitioners are legally and ethically barred by an unwaivable conflict from advising or representing Six4Three, the Superior Court has issued multiple orders that require action by Six4Three, and thus that require Petitioners to provide legal representation and advice to Six4Three. (PA 000517-000548, 000564-000595, 000640-0646.) Petitioners are in an untenable position that can only be remedied by their being relieved as counsel for Six4Three. To prevent any further prejudice to Six4Three, including the conflicted representation by Petitioners, a stay of this action is required until the Superior Court rules on the motions to be relieved as counsel. Petitioners are filing this petition as soon as reasonably practicable since receiving the Superior Court's order denying their application for a stay.

7. When Petitioners are relieved as counsel for Six4Three, Six4Three can engage new, unconflicted counsel to represent its interests in connection with the Superior Court's finding that Facebook established a

prima facie showing that the crime-fraud exception to the attorney client privilege applies. Likewise, Petitioners can represent their own interests without the presence of a conflict.

III. Authenticity Of Exhibits

8. All documents in Petitioners' Appendix accompanying this petition are true and correct copies of original documents filed with the San Mateo County Superior Court, except pages PA-000001 to PA-000280, which is the complete register of actions from the San Mateo County Superior Court website.

9. The citations to Petitioners' Appendix are incorporated by reference as though fully set forth in this petition, and reproduced in their entirety in the concurrently filed Petitioners' Appendix in Support of Petition for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief. The exhibits are paginated consecutively, and page references in this petition are to the consecutive pagination.

10. Because the request for stay was heard ex parte and submitted on the papers, there is no reporter's transcript. The written ruling is provided.

11. This petition does not reveal the contents of any documents sealed by the Superior Court. It is therefore openly filed. (Cal. Rules of Court, Rule 8.46(d)(9).)

IV. Summary Of Material Facts

A. Six4Three's Action Against Facebook

12. Six4Three filed this action against Facebook on April 10, 2015, seeking damages for Facebook's unfair and unlawful business practices in using the Facebook Platform as a "bait and switch" scheme in violation of California's Unfair Competition Law and intentionally interfering with Six4Three's contracts with customers and prospective customers. (PA-000006.) Six4Three alleges that Facebook engaged in a scheme to lure software developers such as Six4Three into developing mobile applications for use on Facebook, thereby helping Facebook to grow its number of users, to enhance the user experience, and to generate additional advertising revenue, but once those goals were achieved, Facebook cancelled the developers' access to its user data so that Facebook could create its own competing applications or award contracts to only select companies who agreed to pay for additional services from Facebook. By cancelling Six4Three's access to the data upon which it had built its app, Facebook succeeded in putting Six4Three out of business.

13. The operative Fifth Amended Complaint ("FAC") was filed on January 12, 2018 alleging causes of action for violation of Business and Professions Code §§ 17200 *et seq.*, breach of contract, concealment, intentional misrepresentation, negligent misrepresentation, intentional interference with contract, intentional interference with prospective

economic relations, and negligent interference with prospective economic relations.

14. On October 25, 2016, the parties entered into a stipulated protective order ("Protective Order"). The Protective Order states that "[a]ny party or non-party may designate as Confidential Information ... any document or response to discovery which that party or non-party considers in good faith to contain information involving trade secrets, confidential business, financial, or personal information ... and any information that is not otherwise available to the public, subject to protection under Rules 2.550, 2.551, 2.580, 8.160, and 8.490 of the California Rule of Court or under provisions of California Law." (PA 000056, 000454-000467.) The same standard applies for designating information as Highly Confidential. Confidential Information can be disclosed to counsel, employees of counsel, individual parties or officers or employees of a party, consultants or expert witnesses, the court and court personnel, or a witness if said witness sign the Certification. (*Id.*) However, Highly Confidential Information is treated the same as Confidential Information, except that it shall not be disclosed to individual parties or director, officers or employees of a party, or to witnesses. (*Id.*)

15. On November 21, 2017, Facebook filed a Special Motion to Strike pursuant to Code of Civil Procedure § 425.16. On January 12, 2018, Six4Three filed its FAC which added Zuckerberg, Cox, Olivan, Lessin,

Vernal and Sukhar (the “Individual Defendants”) as defendants. On May 3, 2018, the Individual Defendants filed a Special Motion to Strike pursuant to Code of Civil Procedure § 425.16. When Six4Three filed its oppositions to the Special Motions to Strike, it included exhibits in support of the oppositions, some of which it lodged under conditional seal. Facebook moved to seal some of Six4Three’s exhibits. Six4Three opposed Facebook’s motions to seal. A number of third parties, including the New York Times Company, the Associated Press, WP Company LLC d/b/a The Washington Post, CNN, the Guardian, the Open Markets Institute, and Test Aankoop, sought and obtained leave to file amicus briefs in support of unsealing Facebook’s documents.

16. On July 16, 2018, the Superior Court denied Facebook’s Special Motion to Strike and granted the Individual Defendants’ Special Motion to Strike. (PA 000174-000175.) Facebook appealed the order denying its Special Motion to Strike on July 24, 2018, and on July 31, 2018, the Superior Court ruled that Facebook’s appeal automatically stayed all further proceedings on the merits of Six4Three’s causes of action. (PA 000175.) On September 19, 2018, Six4Three cross-appealed the order granting the Individual Defendants’ Special Motion to Strike. (PA 000181.) On October 31, 2018, the Superior Court ruled that most of Facebook’s confidential documents would remain under seal. (PA 000188.) On

December 27, 2018, Six4Three appealed the Superior Court's sealing orders.

All of the appeals are pending. (PA 000203.)¹

B. Facebook's Motion To Open Discovery

17. This matter is stayed pending Facebook's appeal of the denial of its anti-SLAPP motion and Six4Three's related cross-appeal. During the stay, without Petitioners' knowledge, the founder and Managing Member of Six4Three, Theodore Kramer, disclosed confidential Facebook information pursuant to an order for production of documents issued by the Digital, Culture, Media and Sport Committee of the House of Commons of the United Kingdom Parliament ("DCMS") on November 21, 2018. Mr. Kramer notified Petitioners two days after the disclosure. Petitioners promptly notified Facebook of the disclosure pursuant to the stipulated Protective Order. Petitioners simultaneously notified the Superior Court of the disclosure.

18. In response, Facebook made certain allegations against both Six4Three and Petitioners regarding the disclosure of confidential

¹ Six4Three is actively represented by counsel other than Petitioners in the two appeals of the orders on the Special Motions to Strike. G&K, as local counsel for Six4Three, is listed as counsel for Six4Three in all three appeals; B&G is also listed as counsel for Six4Three in Facebook's appeal of the order denying its Special Motion to Strike. In order to provide Six4Three an opportunity to find replacement counsel for the appeal of the sealing order, and because Petitioners have not been required to perform any substantive legal work in connection with the appeals, they have held off filing motions to be relieved as counsel in the appeals. However, it is anticipated that such motions will be imminently filed with this Court.

information. Facebook sought relief from the stay to conduct discovery directly against Six4Three and Petitioners, which the Superior Court initially granted, then vacated *sua sponte*. Six4Three stipulated to produce certain non-privileged documents requested by Facebook.

19. On January 8, 2019, Petitioners filed motions to be relieved as counsel for Six4Three on the basis that there was an unwaivable conflict of interest. (PA 000205-000206, 000281-000299, 000357-000379.) The motions to be relieved as counsel were unopposed by Six4Three. (PA 000380-000383.) However, Facebook opposed the motions. (PA 000332-000352, 000387-000391.) The very next day after Petitioners filed their motions to be relieved as counsel, Facebook filed a motion to open discovery and compel. Facebook sought to obtain discovery of privileged attorney-client communications between Petitioners and Six4Three, on the basis that the privilege had been waived pursuant to the crime-fraud exception and otherwise. (PA 000206, 000300-329.)

20. Following oral argument and on March 13, 2019, the Superior Court took Petitioners' motions to be relieved as counsel under submission. (PA 000477-000521.) The Superior Court's minute orders note that its decision is due on June 11, 2019. Two days later, the Superior Court ruled on Facebook's motion to open discovery and compel, finding that Facebook had made a *prima facie* showing that the crime-fraud exception applied, waiving the attorney-client privilege between Six4Three and Petitioners as

to communications concerning the disclosure of confidential information. (PA 000527-000546.) The Superior Court's order lifted for the limited purpose of conducting discovery regarding the disclosure of confidential information, including attorney-client communications between Six4Three and Petitioners.

21. The failure of the Superior Court to rule on Petitioners' motions to be relieved as counsel while at the same time reopening discovery into the very facts which formed the basis for the unwaivable conflict places Petitioners in the untenable dilemma position of being forced to act as counsel for Six4Three pursuant to the Superior Court orders, while a very real conflict prohibits Petitioners from ethically representing Six4Three.

22. In the context of Petitioners' motions to be relieved as counsel, the Superior Court has delayed ruling whether an unwaivable conflict exists between Six4Three and its counsel based on the alleged conspiracy to violate the court order. However, in granting Facebook's motion to open discovery, the Superior Court found that Facebook made a prima facie showing that the exact same alleged conspiracy and violation of the court order does exist.

23. On March 27, 2019, Petitioners filed an Ex Parte Application to Stay Discovery pursuant to the March 15th order granting, in part, and denying, in part, Facebook's Motion to Open Discovery, pending the Superior Court's decision on Petitioners' motions to withdraw as counsel for Six4Three. (PA 000549-000563.) On April 2, 2019, the Superior Court

denied the ex parte application. (PA 000640-000643.)² Although Petitioners are legally and ethically barred from advising or representing Six4Three due to an unwaivable conflict, the Superior Court has issued multiple orders that require action by Six4Three, and thus that require representation of Six4Three by Petitioners. (PA 000517-000548, 000564-000595, 000640-0646.) For example, Facebook has served Six4Three with a request for production of documents, and the Superior Court has ordered counsel for Six4Three and Facebook to meet and confer regarding the document request and appear at a discovery conference on April 26, 2019. (*Id.*) Facebook has also served deposition subpoenas seeking personal appearances and production of documents on Petitioners and on Mr. Kramer. (*Id.*) Petitioners are being forced to represent Six4Three in connection with the discovery and give legal advice, while simultaneously conflicted and/or potentially liable for sanctions for refusal to represent their client. In addition, Case Management Order No. 22 appointed a neutral third party forensic examiner. (PA 000644-000646.) The Superior Court has ordered Petitioners to meet and confer with Facebook concerning search terms, and Six4Three's counsel will have to review the documents extracted by the forensic examiner for privilege, which include attorney-client communications that formed the

² In so ruling, the Superior Court further refused to allow Petitioners to provide the court with additional evidence of the unwaivable conflict between them and Six4Three.

alleged crime-fraud found by the Superior Court, thus solidifying the unwaivable conflict. The discovery conference is set for April 26, 2019, with a case management conference statement due prior to the conference. These are just examples of the legal services Petitioners must perform on behalf of Six4Three by the Superior Court's denial of the request for stay pending a ruling on the motions to be relieved as counsel. Petitioners are being forced to represent Six4Three, even though they are unquestionably conflicted, in order to prevent a default by Six4Three and to preserve Six4Three's rights. Petitioners had an unwaivable conflict of interest beginning when Mr. Kramer turned over Facebook's confidential information to the DCMS Committee. The conflict was exacerbated when Facebook accused Petitioners of engaging in a conspiracy with Six4Three to violate the Superior Court's Protective Order and other orders. And it is axiomatic that after the Superior Court found that Facebook made a prima facie showing that the crime-fraud exception applies, Petitioners cannot possibly defend their alleged co-conspirator, Six4Three consistent with their ethical obligations.

V. Necessity For Writ Of Mandate, Prohibition, Or Other Appropriate Relief

24. Petitioners seek extraordinary relief from this Court in the first instance, because, as will hereafter appear, there is not an adequate remedy at law, and the matters involved herein are of public and general interest to

the people of the State of California and to members of the State Bar of California; and Respondent has abused its discretion. This petition seeks to maintain the *status quo* by staying the proceeding below until the Superior Court decides the motions to be relieved as counsel under submission. Specifically, the petition seeks a writ of mandate, a writ of prohibition, and/or other appropriate relief in connection with the Superior Court's denial of Petitioners' request for stay pending determination of the motions to be relieved as counsel.

25. Writ relief is warranted under these circumstances because the Superior Court improperly denied Petitioners' request to stay the action while their motions to be relieved as counsel are under submission. Petitioners have a right to require the Superior Court to perform its duty. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274.)

26. Petitioners have no plain, speedy and adequate remedy at law. No immediate appeal lies from the March 15, 2019 order opening discovery, and the Superior Court has not yet ruled on Petitioners' motions to be relieved as counsel. Through the Superior Court's order, Facebook was granted the ability to request discovery of Six4Three and Petitioners' attorney-client privileged communications. Petitioners are required to perform legal services on behalf of Six4Three relating to the issue that resulted in the unwaivable conflict in the first place, namely the alleged

violation of the Protective Order and other orders and the Superior Court's finding that Facebook made a prima facie showing that the crime-fraud exception applies resulting in a waiver of the attorney-client privilege. Allowing proceedings in the Superior Court to continue while the motions to be relieved as counsel are under submission, and then attacking the order denying the request for stay is not an adequate remedy. At that point, Six4Three will have been forced to be represented by conflicted counsel on the issue that resulted in the conflict in the first place. This is a bell that cannot be un-rung. Thus, a writ is appropriate relief.

27. Further, Petitioners cannot file a motion for reconsideration, as no new facts or law are present. (Code Civ. Proc., § 1008.)

VI. Application For Stay

28. The March 15, 2019 order grants Facebook the ability to seek discovery of attorney-client communications through document requests and subpoenas duces tecum and leaves open the possibility of allowing Facebook to depose Six4Three and Petitioners. Unless this Court stays the order of the Superior Court until it rules on Petitioners' motions to be relieved as counsel, Six4Three will be forced to be represented by conflicted counsel. There is no other means to protect the interests of Six4Three. If the stay is not granted then it will be represented by counsel that is conflicted based on the very issue that is the subject of the discovery by Facebook, namely the violation of the Protective Order and the finding of the crime-fraud exception. If

Petitioners are forced to continue to represent Six4Three, Six4Three may be irreparably damaged in this action and Petitioners will be in violation of the rules of Professional Conduct, and potentially subject to a malpractice claim.

29. A stay of the proceedings in the trial court is necessary and appropriate: to protect this appellate court's jurisdiction and ability to render an effective order on the writ; to avoid the potential for irreparable harm to Six4Three; because relief in the normal course of the writ is inadequate; because a stay was sought from and denied by the trial court; because the writ raises substantial questions and has merit.

30. The requested stay is of limited duration, as the Superior Court's decision on the motions to be relieved as counsel is due by June 11, 2019.

PRAYER

Petitioners therefore pray that this Court:

1. Issue a peremptory writ of mandate, prohibition, or other appropriate relief in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178) commanding respondent, the Superior Court of San Mateo County, in its Case No. CIV 533328 to stay all proceedings until it issues orders on Petitioners' motions to be relieved as counsel.

2. Or, if a peremptory writ is not issued in the first instance, issue an alternative writ directing respondent Superior Court as set forth in paragraph 1 above or show cause why it should not be compelled to do so.

3. Award Petitioners' costs pursuant to California Rules of Court, Rule 8.493.

4. And grant Petitioners such other extraordinary relief as may be appropriate and just.

DATED: April 10, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

By: /s/ James A. Murphy

James A. Murphy

Attorneys for Petitioner

BIRNBAUM & GODKIN, LLP

VERIFICATION

I, James A. Murphy, declare as follows:

1. I am an attorney at law duly admitted to practice in the State of California, and a Shareholder of the law firm Murphy, Pearson, Bradley & Feeney, counsel for Petitioners in this action.

2. I have read the foregoing Petition for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief and know the contents thereof. I make this verification as petitioner's counsel because I am familiar with the facts relevant to this petition. The facts referred to in this petition are true based on my personal knowledge from my review of the pleadings, briefs, and other documents filed in the Superior Court.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on April 10, 2019, at San Francisco, California.

James A. Murphy

James A. Murphy

MEMORANDUM OF POINT AND AUTHORITIES

I. INTRODUCTION

A lawyer cannot represent clients when there is an unwaivable conflict. (Cal. Rules of Professional Conduct, Rule 1.16(a)(2).) That is what Petitioners are being forced to do while the Superior Court has taken their motions to be relieved as counsel are under submission. Petitioners are being forced by the Superior Court, at the insistence of Facebook but not their clients, to perform legal services on behalf of Six4Three, as a result of several recent court orders entered while an order on the motions to be relieved as counsel remains pending.

Here, an unwaivable conflict exists between Petitioners and Six4Three. This is evident by the Superior Court's finding that Facebook made a prima facie case that Six4Three allegedly violated the Protective Order with the assistance of Petitioners, resulting in a finding that the attorney-client privilege is waived due to the crime-fraud exception. Petitioners are in an untenable position of having to defend Six4Three against these allegations while being accused as co-conspirators.

The remedy is clear: relieve Petitioners as counsel for Six4Three, and require Six4Three to engage new, unconflicted counsel to represent its interests. The Superior Court's refusal to grant a stay while it is deciding the motions to be relieved as counsel is the subject of this writ petition. Irreparable harm will result if Petitioners are forced to continue to represent

Six4Three while the motions to be relieved as counsel because of an unwaivable conflict are pending.

As discussed more fully below, this Court should stay the proceedings in the Superior Court to prevent irreparable harm to Six4Three and Petitioners that could result if Petitioners are forced to continue to represent Six4Three when there is an unwaivable conflict that lies at the very heart of the pending discovery in this matter by Facebook.

II. LEGAL ARGUMENT

A. This Court has independent jurisdiction to preserve the status quo with a writ of mandate or other stay order:

Pursuant to Code of Civil Procedure § 1085(a), "[a] writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person."

Here, the Superior Court denied Petitioners' request to stay discovery pending the Superior Court's ruling on Petitioners' motions to be relieved as counsel. Petitioners request this Court vacate the order denying the request for stay and direct the Superior Court to stay the proceedings pending the determination of Petitioners' motions to be relieved as counsel to prevent

irreversible harm to Six4Three and Petitioners arising out the unwaivable conflict and the simultaneous requirement by the Superior Court to perform legal services by Petitioners on behalf of Six4Three.

A stay of the trial court proceedings is appropriate where a writ is pending on the ruling of motion to disqualify counsel³, since it may potentially infect all subsequent trial court proceedings. (See *Reed v. Sup.Ct. (Case Fin'l, Inc.)* (2001) 92 Cal.App.4th 448, 455 [where the order under challenge is the denial of a disqualification motion, “a reasonably persuasive showing that the claim of disqualification likely has merit will probably persuade the appellate court to stay the underlying proceedings . . . Courts of Appeal understand that prejudice occurs if the trial is not stayed pending an appeal of an arguably meritorious claim of disqualification.”]; and *Apple Computer, Inc. v. Sup.Ct. (Cagney)* (2005) 126 Cal.App.4th 1253, 1263-1264 [“The specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal.”].)

A motion to disqualify counsel is very much akin to the motion to be relieved as counsel at issue in this action, as both motions, although brought by different moving parties, seek the same remedy: the removal of a party's

³ A ruling on a motion to disqualify counsel is directly appealable, but it may also be reviewable by writ on a showing why the appeal remedy would not be sufficiently speedy. (*Apple Computer, Inc. v. Sup.Ct. (Cagney)* (2005) 126 CA4th 1253, 1263-1264.)

legal counsel. Thus, the same arguments which justify a stay of the trial court proceedings pending a writ on a motion to disqualify counsel apply readily to this instance, where Petitioners are awaiting the Superior Court's ruling on their motion to be relieved as counsel due to an unwaivable conflict. As with *Reed* and *Apple Computer*, severe prejudice will indeed occur to Petitioners if the trial court proceedings are not stayed, and this has infected all subsequent trial court proceedings. Petitioners are being forced to provide legal advice and representation to Six4Three in the context of the Superior Court's order allowing discovery to proceed on the crime-fraud exception, while at the same time being unable to ethically serve as legal counsel for Six4Three due to the unwaivable conflict of being accused of being accused of being co-conspirators. Petitioners have been put in an impossible position by the Superior Court's orders, rendering them unable to effectively represent their clients, while at the same time forcing them into a direct breach of their ethical duties.

Moreover, the fact that the Superior Court has issued an order allowing the discovery of privileged attorney-client communications between Petitioners and Six4Three likewise makes a stay appropriate under these circumstances. (See *County of Los Angeles v. Sup.Ct. (Martinez)* (1990) 224 Cal.App.3d 1446, 1451 [if a trial court has granted a motion for discovery of privileged information, it is appropriate for the appellate court to stay the discovery order while considering the writ petition].)

A writ of mandate or other appropriate relief granting a stay of the proceedings while the Superior Court decides Petitioners' motion to be relieved as counsel is necessary to prevent irreversible harm to Petitioners' and their client, Six4Three, arising out of the current conflicted representation.

B. Petitioners are conflicted from representing Six4Three in this action and if required to continue to represent Six4Three while the motions to be relieved as counsel are pending, they will be violating the Rules of Professional Conduct.

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Petitioners were required to seek withdrawal as counsel pursuant to California Rules of Professional Conduct, Rule 1.16(a), which states that following:

Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the lawyer knows or reasonably should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;

(2) the lawyer knows or reasonably should know that the representation will result in violation of these rules or the State Bar Act;

Here, there was an allegation by Facebook that Petitioners were co-conspirators or aided and abetted Six4Three in violating the Protective Order and other orders when confidential Facebook information was disseminated

in London. The Superior Court later found that Facebook had made a prima facie showing that the crime-fraud exception to the attorney-client privilege. Petitioners' representation is inherently conflicted as a result and requiring Petitioners to continue to represent Six4Three in the face of this unwaivable conflict while the motions to be relieved as counsel are pending will not only grossly prejudice Six4Three, but will require Petitioners to violate the Rules of Professional Conduct. The Superior Court erred in denying Petitioners' ex parte application to stay the matter pending its determination of Petitioners' motions to be relieved as counsel. Thus, Petitioners request this Court to direct the Superior Court to vacate its order denying Petitioners' ex parte application to stay the matter and to make an order granting the motion. Petitioners further request that this Court grant a stay of any further proceedings while this writ is pending.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of *supercedeas* or other order staying the proceedings in the trial court during the pendency of this writ; and order the Superior Court to vacate its order denying Petitioners' ex parte application for stay of discovery pending the Superior Court's decision on Petitioners' motions to

be relieved as counsel due to the inherent and unwaivable conflict of interest between Petitioners and their client, Six4Three.

DATED: April 10, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

By: /s/ James A. Murphy
James A. Murphy
Attorneys for Defendant
BIRNBAUM & GODKIN, LLP

KLI.3404880.docx

CERTIFICATE OF WORD COUNT

The text of this brief consists of 5,226 words as counted by the Microsoft Word processing program used to prepare this brief.

DATED: April 10, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

By: /s/ James A. Murphy

James A. Murphy
Attorneys for Defendant
BIRNBAUM & GODKIN, LLP

CERTIFICATE OF SERVICE

I, Alice M. Kay, declare:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108. On April 10, 2019, I served the following document on the parties in the within action:

**PETITION FOR PEREMPTORY WRIT OF PROHIBITION, OR
OTHER APPROPRIATE RELIEF AND REQUEST FOR
IMMEDIATE STAY; MEMORANDUM OF POINTS AND
AUTHORITIES; [SUPPORTING EXHIBITS FILED
CONCURRENTLY HEREWITH]**

X	VIA MAIL: I am familiar with the business practice for collection and processing of mail. The above-described document(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at San Francisco on this date, addressed as listed below.
X	VIA FILE & SERVE: By causing a true and correct copy thereof to be served through File & ServeXpress addressed to all parties appearing on the File & ServeXpress Serve electronic service list.

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I declare under penalty of perjury under the laws of the State of
California that the foregoing is a true and correct statement and that this
Certificate was executed on April 10, 2019.

By: /s/Alice M. Kay/
Alice M. Kay/

EXHIBIT 2

1 IN THE SUPERIOR COURTS OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

3 ---000---

4
5 SIX4THREE, LLC,

CERTIFIED TRANSCRIPT

6 PLAINTIFFS,

7 VS.

CASE NO. CIV533328

8 FACEBOOK, INC., ET AL.,

9 DEFENDANTS.

10
11 _____ /
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS (PAGE 7 - 11 SEALED)

13 BEFORE: HONORABLE V. RAYMOND SWOPE, JUDGE

14 DEPARTMENT 23

15 MARCH 13, 2019

16 A P P E A R A N C E S

17 FOR THE PLAINTIFFS:

18 STUART G. GROSS DAVID S. GODKIN
ATTORNEY AT LAW ATTORNEY AT LAW

19 JAMES A. MURPHY JAMES A. LASSART
ATTORNEY AT LAW ATTORNEY AT LAW

20 FOR THE DEFENDANTS:

21 JOSH H. LERNER LAURA E. MILLER CATHERINE Y. KIM
ATTORNEY AT LAW ATTORNEY AT LAW ATTORNEY AT LAW

22 SONAL N. MEHTA NATALIE NAGLE ZACHARY ABRAHMSON
23 ATTORNEY AT LAW ATTORNEY AT LAW ATTORNEY AT LAW

24 FOR THE PRINCIPAL PARTY:

25 JACK RUSSO
ATTORNEY AT LAW

26 REPORTED BY: GERALDINE VANDEVELD, C.S.R. 8634

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA

MARCH 13, 2019

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THE COURT: GOOD MORNING, EVERYONE. CALLING CASE CIV5333238. THE MATTER OF SIX4THREE VERSUS FACEBOOK, ET AL. WILL COUNSEL, PLEASE, STATE THEIR APPEARANCES FOR THE RECORD.

MR. MURPHY: GOOD MORNING, YOUR HONOR. JAMES MURPHY APPEARING ON BEHALF OF BIRNBAUM AND GODKIN AND PRESENT ALSO IS DAVID GODKIN.

MR. LASSART: JAMES LASSART ALSO APPEARING ON BEHALF OF DAVID GODKIN.

MR. SULLIVAN: DON SULLIVAN FOR STUART GROSS AND GROSS AND KLEIN AND MR. GROSS IS HERE.

MR. RUSSO: JACK RUSSO FOR THE INDIVIDUALS TED KRAMER AND MR. SCARAMELLINO. THEY'RE BOTH HERE.

MS. MEHTA: GOOD MORNING. SONAL MEHTA, JOSH LERNER, LAURA MILLER, CATHERINE KIM AND ZACHARY ABRAHMSON HERE FOR FACEBOOK AND FROM FACEBOOK IS NATALIE NAGLE.

THE COURT: GOOD MORNING. THIS MATTER IS A MOTION TO WITHDRAW AS COUNSEL OF RECORD THAT HAS BEEN FILED BY MR. GODKIN AND HIS FIRM BIRNBAUM AND GODKIN. AND MR. GROSS ON BEHALF OF HIS FIRM. THE COURT HAD SOME QUESTIONS WITH REGARD TO THE NATURE OF THE MOTION AND WANTS TO CONDUCT AN IN CAMERA

1 REVIEW OR HEARING WITH REGARD TO THE CONFLICT. HENCE THE
2 REASON THAT I'M GOING TO BE MEETING IN CHAMBERS WITH THE
3 PARTIES THAT WERE SUBJECT TO THE CONFLICT WHICH MEANS THAT THE
4 CONFIDENTIAL RELATIONSHIP BETWEEN MR. GODKIN'S FIRM AND
5 MR. KRAMER AND MR. GROSS'S FIRM AND MR. KRAMER ARE THE ONLY
6 ISSUES THAT WE'LL BE DISCUSSING IN CHAMBERS. AND TO THAT END,
7 I ASK ONLY THAT MR. GODKIN, MR. GROSS, MR. KRAMER AND
8 MR. SCARAMELLINO BE PRESENT WHILE WE ARE DISCUSSING THESE
9 MATTERS.

10 NO QUESTIONS ARE GOING TO BE ASKED WITH REGARD TO
11 INCRIMINATING MATTERS THAT IS THAT WILL TRIGGER A FIFTH
12 AMENDMENT QUESTION WITH REGARD TO THE PARTIES. SO REST
13 ASSURED THAT THAT'S NOT GOING TO HAPPEN. ALL RIGHT.

14 AND, FURTHER, AFTER THE PROCEEDINGS IN CAMERA, THOSE
15 PROCEEDINGS WILL BE SEALED. SO I'M ORDERING THAT THE
16 TRANSCRIPT CONCERNING THE CONDUCT OF THE IN CAMERA REVIEW AND
17 DISCUSSIONS WILL BE SEALED AND NOT ACCESSED TO ANYONE. AND
18 THIS IS JUST PARTICULAR TO THE MOTION TO WITHDRAW AND NOTHING
19 ELSE, SO IT WILL HAVE NO RELEVANCE TO ANY OTHER SUBSEQUENT
20 HEARINGS. DOES EVERYONE UNDERSTAND THAT? DOES ANYONE HAVE
21 ANY DISAGREEMENT WITH THE COURT'S PRONOUNCEMENT?

22 MR. RUSSO: YOUR HONOR, I WOULD ASK TO BE PRESENT AT
23 THAT HEARING TO MAKE SURE MR. SCARAMELLINO AND MR. KRAMER ARE
24 REPRESENTED. I DON'T EXPECT TO ARGUE. I JUST EXPECT TO
25 LISTEN BECAUSE THEY HAVE ASKED ME TO BE HERE TODAY TO DEAL
26 WITH THIS WITHDRAWAL ISSUE, IF YOU HAVE QUESTIONS. AND YOU

1 MAY HAVE QUESTIONS. YOU MAY HAVE QUESTIONS I CAN ANSWER,
2 WHICH I WILL. OTHERWISE I WOULD LIKE TO OBSERVE IN CHAMBERS
3 WITH YOUR PERMISSION.

4 THE COURT: ALL RIGHT.

5 MS. MEHTA: YOUR HONOR, WE HAVE NO PROBLEM WITH YOU
6 OF COURSE CONDUCTING AN IN CAMERA REVIEW. WE DO HAVE AN
7 OBJECTION TO PERSONAL COUNSEL FOR MR. KRAMER AND
8 MR. SCARAMELLINO BEING THERE. THIS IS A MATTER BETWEEN THE
9 LAWYERS AND SIX4THREE ENTITY FOR WHICH THEY ARE THE
10 REPRESENTATIVES, BUT THEIR INDIVIDUAL COUNSEL NEED NOT BE
11 THERE. AND THAT RAISES A WHOLE SET OF COLLATERAL ISSUES.

12 THE COURT: I THINK I SAID AT THE OUTSET THAT IT'S
13 IMPORTANT TO UNDERSTAND THE RELATIONSHIP BETWEEN COUNSEL AND
14 THE CLIENTS. AND, AGAIN, TO HAVE A PURE HEARING WITHOUT ANY
15 INTERFERENCE OR COACHING OR ANYTHING ELSE, I'VE GOT TO ASK
16 CERTAIN QUESTIONS.

17 IT'S GOING TO BE SEALED, MR. RUSSO. AND I
18 UNDERSTAND THAT YOU'RE ACTING ON BEHALF OF YOUR CLIENTS. BUT
19 THE CONTENT OF THE QUESTIONS AND THE RESPONSES THAT I GET WILL
20 BE PRECEDING DECEMBER 1ST OR CERTAINLY WHEN PERSONAL COUNSEL
21 WERE CALLED IN TO REPRESENT THE RESPECTIVE PARTIES. THE
22 PARTIES' COUNSEL HAVE ONLY INTERVENED RECENTLY OR BEEN
23 REPRESENTING THE PARTIES WITHIN THE LAST THREE MONTHS OR SO.

24 MR. RUSSO: OUR REPRESENTATION STARTED IN NOVEMBER,
25 YOUR HONOR.

26 THE COURT: NOVEMBER WHEN?

1 MR. RUSSO: IT WAS -- I'M SORRY. DECEMBER. YOU'RE
2 CORRECT. IT WAS DECEMBER. IT WAS LIKE DECEMBER 1ST AFTER OR
3 MAYBE EVEN -- AFTER DECEMBER 7. EXCUSE ME.

4 THE COURT: RIGHT. I REMEMBER WHEN YOU CAME TO
5 REPRESENT YOUR CLIENTS. BUT WHAT I WANT IS A PRISTINE,
6 UNADULTERATED, UNCOACHED EXAMINATION. YES.

7 MR. MURPHY: JUST A POINT OF CLARIFICATION. THAT
8 WOULD INCLUDE MR. LASSART AND MYSELF?

9 THE COURT: YES. THAT WAS MY INTENT.

10 MR. LERNER: ONE LAST QUESTION, YOUR HONOR. YOU
11 IDENTIFIED THE QUESTION WE HAD WHICH IS IF SOMEONE WERE TO
12 ASSERT THEIR RIGHTS OR PRIVILEGES THAT WOULD PRECLUDE
13 ANSWERING YOUR QUESTIONS, WE UNDERSTAND THAT YOU ARE SEALING
14 IT AND ANYTHING ELSE. BUT WE WOULD, I BELIEVE, AND I WOULD
15 HOPE YOU AGREE BE ENTITLED TO KNOW THAT EVEN IF IT COULDN'T BE
16 NECESSARILY USED IN SOME WAYS LATER, IT WOULD BE RELEVANT TO
17 US THAT SOMEONE HAD REFUSED TO ANSWER YOUR QUESTIONS BECAUSE
18 THAT WOULD PERTAIN TO OUR ABILITY OBVIOUSLY TO BRING OUR SIDE
19 OF THE ARGUMENT. THAT'S OUR ONLY REQUEST.

20 THE COURT: I THINK THE ATTORNEY/CLIENT PRIVILEGE
21 RAISING THE PRIVILEGE ISSUE IS NOT CONFIDENTIAL IN ITSELF, BUT
22 THE REASONS BEHIND IT CERTAINLY WILL BE. ALL RIGHT. OKAY.
23 SO WHAT WE'RE GOING TO DO IS TAKE A FEW MINUTES TO SET UP IN
24 MY CHAMBERS. I WILL BE ASKING A SERIES OF QUESTIONS THAT
25 WON'T TAKE TOO TERRIBLY LONG. AND THEN I WILL -- DEPENDING
26 UPON HOW THE QUESTIONS ARE ASKED, I WILL LIKELY TAKE IT UNDER

1 SUBMISSION. OKAY. THAT WILL CHANGE, OF COURSE, IF THERE'S A
2 RAISE OF PRIVILEGE. BUT I DON'T KNOW THAT.

3 ALL RIGHT. SO THE COURT IS IN RECESS. WE ARE GOING
4 TO RETIRE TO MY CHAMBERS FOR THE EXAMINATION. AND MR. GODKIN
5 AND MR. GROSS, MR. SCARAMELLINO AS A MEMBER OF THE LEGAL TEAM
6 AND MR. KRAMER SHALL BE IN MY CHAMBERS. WE WILL CALL YOU BACK
7 AS SOON AS OUR COURT REPORTER GETS SET UP. OKAY. THANK YOU.

8 (WHEREUPON, A RECESS WAS TAKEN.)

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26 (PAGES 7 THROUGH 11 COURT ORDERED SEALED.)

1 THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD.
2 AND WE HAD PREVIOUSLY TERMINATED THE IN CAMERA REVIEW. THE
3 ATTORNEY/CLIENT PRIVILEGE WAS RAISED BY THE PRINCIPAL FOR
4 SIX4THREE. THEREFORE, THE INQUIRY WILL BE CONCLUDED. I HAVE
5 A COPY OF THE RETAINER AGREEMENT THAT I'M GOING TO RETURN TO
6 MR. GROSS.

7 MR. GROSS: WOULD YOU LIKE ME TO APPROACH THE BENCH,
8 YOUR HONOR?

9 THE COURT: I WILL HAVE MY BAILIFF RETURN IT TO YOU.
10 AND I DID NOT REVIEW IT BY THE WAY UNDER THE CIRCUMSTANCES.
11 VERY WELL. I DO HAVE A COUPLE QUESTIONS FOR MR. SCARAMELLINO.
12 AND I REMIND YOU THAT YOU REMAIN UNDER OATH.

13 Q. MR. SCARAMELLINO, ARE YOU CURRENTLY A LICENSED
14 ATTORNEY?

15 A. NO, YOUR HONOR.

16 Q. SO YOU'RE NOT LICENSED IN NEW YORK OR NEW JERSEY OR
17 IN CALIFORNIA, CORRECT?

18 A. THAT IS CORRECT, YOUR HONOR.

19 Q. OKAY. SO YOU WERE NEVER LICENSED IN ANY STATE AT
20 ANY POINT IN 2018; IS THAT CORRECT?

21 A. THAT IS CORRECT, YOUR HONOR.

22 Q. WERE YOU LICENSED ON MAY 15, 2018?

23 A. NO, YOUR HONOR.

24 THE COURT: VERY WELL. THANK YOU. GIVEN THE
25 NOVEMBER 30TH, 2018, HEARING AND THE RELATED DECLARATION WHERE
26 MR. GODKIN DISCUSSED THE NATURE OF THE CONFLICT OR THAT A

1 CONFLICT HAD ARISEN AND GIVEN THE VARIOUS EMAILS ATTACHED TO
2 MS. KIM'S DECLARATION IN OPPOSITION TO THE MOTIONS TO WITHDRAW
3 AND GIVEN THE DECLARATIONS FILED BY MR. GODKIN AND MR. KRAMER,
4 I FIND THAT THERE IS NO CONFLICT WITHOUT FURTHER EVIDENCE.
5 THEREFORE, THE MOTIONS TO WITHDRAW ARE DENIED WITHOUT
6 PREJUDICE.

7 WE WILL PROCEED WITH THE HEARINGS ON FRIDAY,
8 MARCH 15TH. AND THE HEARINGS WILL BE ON THE FOLLOWING
9 MATTERS. FACEBOOK'S MOTION TO SEAL PORTIONS OF THEIR
10 OPPOSITION TO THE MOTIONS TO WITHDRAW. THE ANTI-SLAPP
11 ATTORNEY'S FEES MOTIONS BY EACH OF THE PARTIES AND FACEBOOK'S
12 MOTION TO OPEN DISCOVERY. AS WELL AS THE CASE MANAGEMENT
13 CONFERENCE. THOSE MATTERS WILL PROCEED ON FRIDAY AS
14 SCHEDULED.

15 IN ADDITION, WE'RE GOING TO NEED A NOTICE OF ERRATA
16 SHEET FROM MR. GODKIN WITH REGARD TO MR. GODKIN'S DECLARATION.
17 THERE WERE NO EXHIBITS THAT WERE FILED OR LODGED WITH THE
18 COURT WITH RESPECT TO YOUR DECLARATION IN RELATION TO FRIDAY'S
19 PROCEEDINGS. ALL WE HAVE IS THE BARE DECLARATION WITHOUT THE
20 ATTACHMENTS, SO THEY SHALL BE FILED AND ELECTRONICALLY SERVED
21 NO LATER THAN TODAY MARCH 13TH, 2019, SO THAT THE COURT HAS
22 THEM TOMORROW MORNING.

23 DOES ANYONE SEEK ANY FURTHER CLARIFICATION AS TO
24 THAT ORDER? ANYTHING FURTHER?

25 MR. LERNER: YES, YOUR HONOR.

26 THE COURT: YES. MR. MURPHY.

1 MR. MURPHY: BRIEFLY, YOUR HONOR.

2 THE COURT: YES.

3 MR. MURPHY: I UNDERSTAND THAT THE COURT IS DECIDING
4 THE ISSUE ON THE MOTION TO BE RELIEVED AS COUNSEL ON THE BASIS
5 OF THE IN CAMERA IN PART, BUT I THINK THE COURT COULD ALSO
6 LOOK AT THE OPPOSITION TO THE MOTION TO BE RELIEVED AS COUNSEL
7 TO SEE WHERE THE CONFLICT LIES.

8 FACEBOOK HAS TAKEN THE POSITION THAT IT WILL BE
9 SEEKING DISCOVERY, POSSIBLE SANCTIONS AGAINST THE LAWYERS AND
10 AGAINST SIX4THREE FOR AMONG OTHER THINGS VIOLATING THE COURT
11 ORDER AS OF MARCH 18, 2018.

12 I DON'T THINK THERE'S ANY QUESTION BUT THAT
13 FACEBOOK HAVING RAISED THE CONFLICT, NOW CLAIMING THAT THERE
14 IS NO CONFLICT CANNOT HAVE IT BOTH WAYS. IT'S CLEAR FROM THE
15 ALLEGATIONS SET FORTH IN THEIR OPPOSITION THAT THERE IS AN
16 UNWAIVABLE CONFLICT THAT PREVENTS MY CLIENT AND PROBABLY
17 MR. GROSS AS WELL FROM ADVISING SIX4THREE WITH RESPECT TO ITS
18 RIGHTS.

19 FURTHERMORE, AND I CAN'T CITE TO THE NEW RULE OF
20 PROFESSIONAL RESPONSIBILITY. BUT UNDER 3310, CLEARLY THERE IS
21 A CONFLICT BETWEEN THE BEST INTEREST OF BIRNBAUM AND GODKIN
22 AND THE BEST INTEREST OF MR. GROSS'S FIRM AND THE SIX4THREE
23 PARTIES WHICH PREVENTS MY CLIENT FROM ADVISING SIX4THREE IN
24 ANY ASPECT.

25 SO THE CONFLICT HAS BEEN T'D UP BY FACEBOOK. THE
26 CONFLICT HAS BEEN ESTABLISHED BY FACEBOOK. I DON'T THINK ANY

1 TESTIMONY FROM ANY OF THE PRINCIPALS OF SIX4THREE IS GOING TO
2 CHANGE WHAT FACEBOOK HAS CREATED. AND THAT IS AN UNAVOIDABLE,
3 UNWAIVABLE CONFLICT THAT PREVENTS MY CLIENT FROM PROPERLY
4 ADVISING SIX4THREE. IT JUST CAN'T DO IT.

5 THE COURT: ALL RIGHT. SO THAT WE'RE CLEAR, RECITE
6 FOR THE RECORD WHAT THE UNWAIVABLE CONFLICT IS. ARE YOU
7 SAYING THAT THE UNWAIVABLE CONFLICT IS THE FACT THAT THERE
8 WILL BE DISCOVERY BOTH AS TO THE ATTORNEYS AND TO THE CLIENTS?

9 MR. MURPHY: THAT'S PART OF IT, YOUR HONOR. I THINK
10 IF YOU TAKE A LOOK AT THE OPPOSITION FILED BY FACEBOOK TO THE
11 MOTION TO BE RELIEVED AS COUNSEL, THAT CLEARLY SHOWS WHERE THE
12 CONFLICT EXISTS. AND BECAUSE OF THAT POTENTIAL CONFLICT
13 BECAUSE OF THE UNWAIVABLE ASPECT OF THAT CONFLICT FOR FACEBOOK
14 TO ACCUSE MY CLIENT ITSELF AND MR. GODKIN HIMSELF VIOLATING
15 THE COURT ORDER AND AIDING AND ABETTING THE CLIENT ALLEGEDLY
16 VIOLATING THE COURT ORDER, MY CLIENT'S HANDS ARE TIED. IT
17 CANNOT PROPERLY ADVISE SIX4THREE. SIX4THREE NEEDS INDEPENDENT
18 COUNSEL TO ADVISE IT.

19 SO WHEN YOU TALK ABOUT THE BREAKDOWN OF THE
20 ATTORNEY/CLIENT RELATIONSHIP, IT'S NOT JUST BECAUSE THE CLIENT
21 IS NOT PAYING THE LAWYER OR THERE MAY BE SOME OTHER ASPECTS
22 BETWEEN THE RELATIONSHIP OF THE LAWYER AND THE CLIENT THAT HAS
23 RESULTED IN THE IRREMEDIALABLE BREAKDOWN OF THE RELATIONSHIP.
24 IT'S WHAT THEY'VE CREATED. THEY HAVE CREATED A SITUATION
25 WHERE MY CLIENT IS UNABLE TO DISCHARGE ITS PROFESSIONAL
26 RESPONSIBILITIES TO SIX4THREE.

1 IT HAS CREATED -- FACEBOOK HAS CREATED A SITUATION
2 WHERE THERE IS AN UNWAIVABLE CONFLICT BETWEEN THE INTEREST OF
3 BIRNBAUM AND GODKIN ON ONE HAND AND SIX4THREE ON THE OTHER.
4 SO I UNDERSTAND THE COURT'S CONCERN ABOUT THE IN CAMERA, BUT I
5 THINK THE ISSUE OF THE CONFLICT HAS BEEN IDENTIFIED BY
6 FACEBOOK IN ITS OPPOSITION. AND I WOULD SUBMIT ON THAT BASIS
7 ALONE THE MOTION SHOULD BE GRANTED.

8 THE OTHER THING, YOUR HONOR, IS I WOULD REQUEST
9 RESPECTFULLY BECAUSE I HAVE A LOT OF RESPECT FOR THE COURT IS
10 THAT THE HEARINGS ON FRIDAY BE DEFERRED BECAUSE IF THE COURT'S
11 RULING IS GOING TO STAND, WE WOULD LIKE THE OPPORTUNITY TO AT
12 LEAST HAVE IT REVIEWED PURSUANT TO A WRIT PROCEEDING.

13 MR. SULLIVAN: THANK YOU, YOUR HONOR. DON SULLIVAN
14 FOR MR. GROSS. I WOULD JUST ADD THAT THERE IS A FUNDAMENTAL
15 BREAKDOWN IN THE ATTORNEY/CLIENT RELATIONSHIP AND THAT IS
16 ALTERNATE GROUND FOR GRANTING THE MOTION. I AGREE 100 PERCENT
17 WITH WHAT MR. MURPHY SAID.

18 ADDITIONALLY, MR. GROSS HAS BEEN ALLEGED TO BE
19 ALLUDING OR ENGAGING IN VARIOUS ACTIVITIES WITH SIX4THREE AND
20 HE CANNOT DEFEND HIMSELF. THAT'S THE CONFLICT. HE CANNOT
21 DEFEND HIMSELF BECAUSE OF THE ATTORNEY/CLIENT PRIVILEGE, WHICH
22 MR. KRAMER REFUSED TO WAIVE. SO THERE'S AN UNTENABLE
23 CONFLICT. THEIR INTEREST ARE DYNAMICALLY OPPOSED. HE CANNOT
24 DEFEND HIMSELF WHILE HE IS STILL COUNSEL FOR SIX4THREE. THANK
25 YOU.

26 THE COURT: MR. LERNER.

1 MR. LERNER: YOUR HONOR, YOU NEVER GOT AN ANSWER TO
2 YOUR QUESTION ABOUT WHAT THE CONFLICT IS. YOUR HONOR, THE
3 ARGUMENT THAT WE CREATED THAT CONFLICT HERE IS MADE UP.
4 OUR ARGUMENT IS THAT THERE WAS A NOW UNDENIABLE AND UNDISPUTED
5 VIOLATION OF THIS COURT'S ORDER. I THINK THE EASIEST WAY TO
6 DISCERN THAT THIS IDEA THAT WE CREATED A CONFLICT OR THAT
7 THERE EVEN IS ONE ON THE RECORD BEFORE THE COURT IS TO LOOK
8 BACK AT THE LAST TIME THERE WAS A SERIOUS PROBLEM HERE WHICH
9 WAS WHEN SIX4THREE DESTROYED THE RECORD AS TO ITS ALLEGED
10 BUSINESS AND HOW MUCH MONEY IT HAD MADE.

11 AND AT THAT TIME SIMILARLY WE SAID, "WHERE ARE THESE
12 DOCUMENTS AND WHY ON COUNSEL'S WATCH OBVIOUSLY DID THE
13 DOCUMENTS DISAPPEAR?" AT THAT TIME THERE WAS NO ARGUMENT THAT
14 BECAUSE SANCTIONS WERE BEING SOUGHT OR WE WANTED DISCOVERY
15 THAT COUNSEL HAD TO RUN FOR THE HILLS.

16 THIS IS MADE UP. WE ARE PURSUING THE PROBLEM THAT
17 THEY ARE MAKING. IT IS NOT A CONFLICT THAT HAS BEEN DESCRIBED
18 OR IDENTIFIED IN ANSWER TO YOUR HONOR'S QUESTION AT ALL SO
19 FAR. IF THEY WANT TO DO IT EVENTUALLY WITHOUT ASSERTING
20 PRIVILEGE TO YOUR POINT, THEY MIGHT. BUT THEY HAVE NOT YET.
21 AND THE ARGUMENT WE HAVE MADE ON THEIR FACE DO NOT ASSERT OR
22 CREATE A CONFLICT. AND THAT'S WHY IN ANSWERING YOUR QUESTION
23 THEY DIDN'T IDENTIFY A CONFLICT.

24 THE COURT: SO ARE YOU SEEKING -- I'M SORRY FOR
25 INTERRUPTING.

26 MR. LERNER: I APOLOGIZE FOR SPEAKING OVER YOU.

1 THE COURT: ALL RIGHT. SO ARE YOU SEEKING DISCOVERY
2 AS TO WHAT THE ATTORNEYS DID DURING THE COURSE OF THE LAST
3 SEVERAL MONTHS IN RELATION TO THE DISCLOSURE OF CONFIDENTIAL
4 INFORMATION PURSUANT TO THE STIPULATED PROTECTIVE ORDER?

5 MR. LERNER: YES, YOUR HONOR. AS YOU IDENTIFIED AND
6 EXPLAINED, WE NEED TO SATISFY THE BURDENS FOR DOING THAT. AND
7 THERE IS A HIGH BURDEN FOR DOING THAT, WHICH WE BELIEVE IS
8 SATISFIED HERE. AND IN THOSE CASES, THE CASES DO NOT SAY THAT
9 MERELY BECAUSE IN SOME INSTANCES DISCOVERY CAN BE REQUIRED
10 FROM COUNSEL, THAT CREATES A WAIVABLE CONFLICT THAT MUST MEAN
11 COUNSEL CAN'T PARTICIPATE IN THE CASE.

12 THE CASES DON'T SAY THAT. THEY SAY YOU MUST MEET
13 THE STANDARD FOR THE DISCOVERY. THEY DON'T SAY ONCE YOU MET
14 THAT STANDARD, COUNSEL IS OUT. NONE OF THE CASES SAY THAT AND
15 THEY HAVEN'T ARGUED AS MUCH.

16 THE COURT: OKAY.

17 MR. LERNER: IF I MAY VERY QUICKLY BEFORE THE
18 HEARING ON FRIDAY, THERE ARE A COUPLE OF OUTSTANDING ISSUES
19 WITH RESPECT TO YOUR HONOR'S ORDER. YOUR HONOR ASKED FOR BUT
20 DID NOT RECEIVE DECLARATIONS FROM THE QUOTE UNQUOTE "EXPERTS."
21 MR. DEHAYE IN PARTICULAR HAS NOT PROVIDED THAT DECLARATION.
22 GIVEN THAT THE SAME DOCUMENTS THAT YOUR HONOR ORDERED SEALED
23 KEEP ON POPPING UP, WE DON'T UNDERSTAND WHY PEOPLE WHO SIGNED
24 THE PROTECTIVE ORDER IN THIS CASE ARE BOUND BY IT AND WERE
25 WORKING FOR COUNSEL CAN'T PROVIDE THAT DECLARATION. AND IT'S
26 OBVIOUSLY TROUBLING TO US BECAUSE THESE DOCUMENTS AREN'T

1 SHOWING UP ON THE INTERNET BY MISTAKE.

2 WE NEED TO FIGURE OUT WHERE THEY ARE COMING FROM.
3 SO FOR MR. DEHAYE AND FRISSORA, WE DO BELIEVE THAT COUNSEL
4 SHOULD PROVIDE THE DECLARATIONS OR THE COURT SHOULD ORDER
5 THOSE EXPERTS WHO SIGNED THE DECLARATIONS AND SHOULD BE
6 SUBJECT TO YOUR HONOR'S JURISDICTION TO PROVIDE THEM.

7 THE LAST THING, WHICH I BELIEVE YOU IDENTIFIED AND
8 ALREADY PICKED OUT IS WHEN COUNSEL WANTED TO PROTECT
9 PRIVILEGE, EVERYTHING THAT MR. SCARAMELLINO DID WAS AS A
10 MEMBER OF THE LEGAL TEAM AND INDEED AS YOUR HONOR POINTED OUT
11 ON MAY 15TH, HE WROTE AND REPRESENTED TO THE THIRD PARTY,
12 "THANKS, FRANK. I AM AN ATTORNEY AND MEMBER OF THE LEGAL TEAM
13 HERE."

14 AND THEY SAID THEY WERE SUPERVISING EVERY STEP HE
15 TOOK. ALL OF HIS WORK WAS SUPERVISED BY THEM. THAT'S -- THAT
16 WAS THE ARGUMENT WHEN WE TRIED TO GET THE COMMUNICATIONS WITH
17 MR. SCARAMELLINO. NOW IN ANSWER TO YOUR HONOR'S QUESTION
18 ABOUT WHAT THE LEGAL TEAM DID, MEMBERS OF YOUR TEAM UNDER YOUR
19 INSTRUCTION OR ANYTHING ELSE. THE ANSWER TO YOUR QUESTION IS
20 MY FIRM, MY LAW FIRM I.E. NOT MR. SCARAMELLINO DID THE
21 FOLLOWING THINGS. AND WE DIDN'T CONDONE OR ASK
22 MR. SCARAMELLINO TO DO X, Y OR Z.

23 MR. SCARAMELLINO SHOULD SIGN A DECLARATION JUST LIKE
24 MR. GODKIN CLARIFYING WHO, IF ANYONE, HE SHARED THIS
25 INFORMATION WITH. SO THAT WE CAN START TO GET TO THE BOTTOM
26 AGAIN OF WHERE THIS INFORMATION IS COMING FROM AND WHY IT

1 KEEPS ON POPPING UP NOTWITHSTANDING THIS COURT'S ORDERS.

2 SO THOSE WERE THE THREE THINGS THAT WE BELIEVE WOULD
3 BE HELPFUL BEFORE THE HEARING ON FRIDAY. AND WE APPRECIATE
4 YOUR HONOR'S TIME.

5 THE COURT: THANK YOU. MR. RUSSO.

6 MR. RUSSO: THANK YOU, YOUR HONOR. I WOULD JUST
7 LIKE YOUR HONOR TO HAVE OR TAKE NOTICE OF AND CERTAINLY I CAN
8 HAND YOU MY COPY OF IN RE KOEHLER. IN RE KOEHLER IS THE CASE.

9 THE COURT: I READ THAT CASE. I READ IT RIGHT
10 BEFORE OR RIGHT AFTER I BECAME A JUDGE. THERE IS NO CONTEMPT
11 ORDER THAT'S BEING ISSUED. SO WHAT'S THE BASIS FOR THE
12 REFERENCE?

13 MR. RUSSO: THIS IS THE CONUNDRUM, YOUR HONOR. IT'S
14 WHY YOU'RE HAVING THESE DIAMETRIC VIEWS IN MY VIEW WHY THE
15 LAWYERS ARE SO CONCERNED. FACEBOOK CONTINUES TO ASSERT
16 AGAINST BOTH THE LAWYERS AS WELL AS AGAINST SIX4THREE THE
17 ENTITY AS WELL AS AGAINST SIX4THREE'S PRINCIPALS. THE TWO
18 GENTLEMEN THAT YOU JUST TALKED WITH IN CHAMBERS. THAT THERE
19 WILL SHORTLY BE A CONTEMPT FILING.

20 THEY HAVEN'T SAID WHETHER IT'S CIVIL. THEY HAVEN'T
21 SAID WHETHER IT'S CRIMINAL. THEY HAVEN'T SAID WHETHER IT'S
22 HYBRID. SOMETIMES CALLED CIVIL PUNITIVE. KOEHLER LAYS OUT
23 THE RULES THAT FACEBOOK MUST FOLLOW. WE SENT A COPY TO
24 KOEHLER ALMOST WITHIN A WEEK OF US STARTING REPRESENTATION
25 SAYING "WHAT'S THE END GAME?" WE NEVER GOT A RESPONSE. WE
26 ISSUED FIVE QUESTIONS.

1 WHAT ARE THE ACTS OF CONTEMPT? WHAT ARE THE
2 ALLEGATIONS OF CAPABILITY TO FOLLOW THE ORDER OF THIS COURT?
3 WHAT IS THE EVIDENCE YOU'RE ASSERTING OF WILLFULNESS? WE LAID
4 OUT THESE QUESTIONS. SILENCE. WE RESENT THE QUESTIONS TO ALL
5 THE LAWYERS ON THE FACEBOOK SIDE. THERE'S LIKE SIX OF THEM.
6 SILENCE.

7 IT'S DEAFENING BECAUSE THEY WANT TO CLOBBER BOTH THE
8 LAWYERS AS WELL AS SIX4THREE AS WELL AS THE INDIVIDUALS, BUT
9 NOT ACTUALLY TAKING THE POSITION OF ARE THEY GOING TO CHARGE
10 THESE INDIVIDUALS AND LAWYERS WITH CRIMINAL CONTEMPT? IN
11 WHICH CASE IT'S A JURY TRIAL. IT'S A RIGHT TO COUNSEL. IT'S
12 A RIGHT TO DEFEND THEMSELVES. AND THEY HAVE TO PROVE THIS
13 BEYOND A REASONABLE DOUBT.

14 I'M NOT SURE YOUR HONOR CAN BE THE PERSON THAT WOULD
15 ACTUALLY TRY THAT CASE THAT KOEHLER ADDRESSES THAT QUESTION.
16 I'M NOT SURE THAT THE FACEBOOK LAWYERS CAN ACTUALLY BE THE
17 LAWYERS WHO BRING THAT CHARGE. THEY MAY WELL HAVE TO GO TO
18 THE DISTRICT ATTORNEY AND ASK THE DISTRICT ATTORNEY TO BRING
19 THAT CHARGE. THAT GOES INTO THE CRIMINAL DIVISION OF THIS
20 COURT, NOT NECESSARILY THE CIVIL DIVISION.

21 IF IT IS CIVIL CONTEMPT, WHAT IS IT THAT THEY'RE
22 AFTER? EVERY ORDER THAT YOUR HONOR HAD SAID I KNOW HOW MUCH
23 TIME HAS BEEN SPENT INCLUDING THESE LAWYERS TRYING TO
24 SCRUPULOUSLY FOLLOW WHAT YOUR HONOR HAS ASKED THEM TO DO.
25 FACEBOOK NEVER WENT TO THE UNITED KINGDOM WHERE THE
26 PARLIAMENT'S ORDER WAS ISSUED WHERE THE CONTEMPT CITATION WAS

1 MADE ON MR. KRAMER PERSONALLY AFTER MULTIPLE NOTICES FROM
2 MR. GODKIN.

3 THAT'S THE PART OF THIS CASE THAT'S COMPLETELY
4 SILENT. THAT'S THE PART OF THIS CASE THAT GETS TO THERE'S NO
5 WILLFULNESS. MR. KRAMER WAS AS SCARED AS HE HAS BEEN IN THIS
6 COURTROOM IN FRONT OF YOUR HONOR AS WELL AS IN CHAMBERS IN
7 DEALING WITH THIS PROBLEM WHICH IS WHAT AM I SUPPOSED TO DO?
8 GO TO JAIL IN THE U.K.?

9 THE COURT: MR. RUSSO, YOU HAVE OPENED UP THE DOOR
10 TO A LOT MORE THAN THE SCOPE OF THESE PROCEEDINGS. I HAVE
11 READ SEVERAL DOCUMENTS NOW AND I REREAD SOME DECLARATIONS.
12 AND WITHOUT PASSING JUDGMENT OR MAKING A RULING ON WHAT YOU'RE
13 SAYING, IT APPEARS BASED UPON WHAT I HAVE READ THAT THE
14 DISCLOSURE OF THOSE DOCUMENTS WAS T'D UP WEEKS BEFORE. MAYBE
15 EVEN MONTHS BEFORE THE ACTUAL DISCLOSURE.

16 AND IT APPEARS THAT MR. KRAMER HAD THE CONFIDENTIAL
17 INFORMATION BY AT LEAST NOVEMBER 2ND WHICH IS LONG BEFORE. AT
18 LEAST TWO WEEKS BEFORE THE LETTER STARTED COMING FROM THE
19 DCMS. THAT'S JUST WHAT THE DECLARATIONS ABOUT WHAT THE EMAILS
20 SAY, WHICH ARE REALLY INCONSISTENT WITH THE DECLARATION. BUT
21 THOSE EMAILS ARE ATTACHED TO YOUR OWN CLIENT'S DECLARATION.

22 MR. RUSSO: SO ISN'T THE CORRECT PROCEDURE THEN AS
23 SUGGESTED IN EARLIER PROCEEDINGS FACEBOOK SHOULD REQUEST AN
24 ORDER TO SHOW CAUSE, MAKE A POSITION OR TAKE A POSITION ON
25 WHETHER IT'S CRIMINAL OR CIVIL OR HYBRID. AND THEN KOEHLER
26 HAS TO BE STRICTLY FOLLOWED. THAT'S THE RULE IN THIS

1 DISTRICT. THAT'S THE RULE IN CALIFORNIA.

2 AND THAT'S WHAT THESE LAWYERS ARE WORRIED ABOUT,
3 RIGHTFULLY WORRIED ABOUT BECAUSE IN THE CASE MANAGEMENT
4 CONFERENCE STATEMENT COUNSEL FOR FACEBOOK WERE VERY CLEAR THEY
5 ARE FILING TWO MOTIONS ON SPECIFIC DAYS. THEY'VE ACTUALLY
6 SAID THIS IN YOUR LATEST CASE MANAGEMENT CONFERENCE STATEMENT.
7 THEY SAID, "WE ARE FILING A MOTION FOR TERMINATING SANCTIONS."
8 THERE'S A BIG ISSUE THERE, A FOOTNOTE. "WHILE THE CASE IS ON
9 APPEAL AND OTHERWISE STAYED MAY BE POTENTIALLY REMOVING
10 APPELLATE JURISDICTION." YOU CAN DEAL WITH THAT SEPARATELY.

11 "BUT WE'RE ALSO FILING A CONTEMPT CHARGE." THEY
12 DON'T SAY IF IT'S CIVIL. THEY DON'T SAY IF IT'S CRIMINAL.
13 THEY DON'T SAY IF IT'S HYBRID. THEY ALSO DON'T SAY WHO IS
14 GOING TO BE SUBJECT TO CONTEMPT. THEY ARE NOW SUGGESTING I
15 THINK AT LEAST INDIRECTLY THAT THERE ARE EXPERTS INCLUDING A
16 COUPLE OVERSEAS EXPERTS. THIS GENTLEMAN NAMED MR. DEHAYE HAS
17 A LAWYER, I BELIEVE, IN SWITZERLAND. THERE'S SOME REFERENCE
18 OR SOMEWHERE IN THE EUROPEAN UNION REFERENCED TO A LAWYER
19 WRITING TO COUNSEL OF FACEBOOK SAYING THE PARTICULAR EXPERT IS
20 REPRESENTED BY COUNSEL BUT LIVES OVERSEAS. IS THERE
21 JURISDICTION?

22 KOEHLER IS VERY CLEAR THERE HAS TO BE PERSONAL
23 SERVICE OF THE ORDER TO SHOW CAUSE. MR. SCARAMELLINO LIVES IN
24 NEW YORK. I THINK HE'S VOLUNTEERED TO COME HERE. HE IS NOT
25 HERE EVERY DAY OF THE WEEK. HE'S NOT A CALIFORNIA LAWYER YET.
26 HE HAS PASSED THE BAR EXAM, BUT HE HASN'T YET OFFICIALLY

1 GOTTEN HIS LICENSE CERTIFICATE. HE'S STATED THAT TO THE
2 COURT. I THINK HE WOULD APPEAR. I THINK HE WOULD DEFEND
3 HIMSELF. HE NEVER INTENDED TO VIOLATE THE ORDER.

4 MR. KRAMER NEVER INTENDED TO VIOLATE THE ORDER.
5 YOU'VE HEARD ALL THESE THINGS, BUT WE HAVE TO GET THE RIGHT
6 PROCEDURE DONE. THIS IS MY POINT. I THINK THESE LAWYERS
7 WOULD CORRECTLY -- I THINK YOUR HONOR IS CORRECT IN SAYING THE
8 CONFLICT IS NOT YET MATURE BECAUSE FACEBOOK HASN'T FILED A
9 CONTEMPT MOTION SO MAYBE THE LAWYERS SHOULD CONTINUE TO
10 REPRESENT, BUT THEY'RE ANTICIPATING IT. THEY'VE LAWYERED UP.
11 THEY COULD SEE WHAT'S COMING. THEY COULD SEE THE STORM
12 COMING.

13 SO NOW THE QUESTION IS WHAT'S THE RIGHT PROCEDURE?
14 I KNOW NO CASE THAT IS POST KOEHLER THAT SAYS THE RIGHT
15 PROCEDURE IS FACEBOOK GETS TO SUGGEST TO FILE A CONTEMPT
16 WITHOUT SAYING WHAT IT IS. AND THEY GET TO DO DISCOVERY AS
17 THOUGH IT'S A NEW LAWSUIT. THE CASE IS OTHERWISE STAYED. THE
18 RIGHT APPROACH UNDER KOEHLER IS THEY HAVE TO DO THE EXACT
19 STEPS THAT KOEHLER SAYS. AND THEN YOUR HONOR COULD DECIDE IF
20 IT'S CRIMINAL, WHAT ARE THE RULES ON DISCOVERY IN CRIMINAL
21 CASES? THEY'RE VERY DIFFERENT THAN IN CIVIL CASES. A LOT OF
22 STUFF IS DIFFERENT BETWEEN CRIMINAL AND CIVIL, AS YOUR HONOR
23 KNOWS.

24 THE COURT: THE FOCUS OF KOEHLER WAS THE CONFLICT
25 BETWEEN DIRECT CONTEMPT AND INDIRECT CONTEMPT. THE JUDGE IN
26 KOEHLER THE TRIAL JUDGE IN KOEHLER JAILED SOMEONE FOR

1 SOMETHING THAT WAS ESSENTIALLY INDIRECT CONTEMPT, WHICH THE
2 COURT CANNOT DO. AND THERE ARE PROCEDURES TO GOVERN THAT FACT
3 PATTERN. AND THAT'S WHY THE COURT OF APPEAL ARTICULATED WHAT
4 INDIRECT CONTEMPT WAS AND THE PROCEDURES WITHIN INDIRECT
5 CONTEMPT. I UNDERSTAND THAT.

6 MR. RUSSO: THERE'S NO QUESTION. FACEBOOK IS NOT
7 SAYING THAT THERE'S BEEN A DIRECT CONTEMPT IN FRONT OF YOUR
8 HONOR. FACEBOOK IS SAYING SOME TIME AT THE POINT AT WHICH
9 MR. KRAMER WAS IN LONDON EVEN AFTER NOTICES WERE SENT TO
10 FACEBOOK UNDER SECTION 16 OF THE STIPULATED PROTECTIVE ORDER
11 AND FACEBOOK DID NOTHING FOR DAYS FOR WEEKS. ARGUABLY FOR
12 MONTHS BECAUSE IT IS NOT CLEAR THAT THEY COULD DO SOMETHING
13 EVEN IN THE U.K. NOW.

14 THEY SIMPLY IGNORED SECTION 16. AND KRAMER FELT
15 LIKE HE WAS GOING TO JAIL IN LONDON BECAUSE HE WAS THE SUBJECT
16 TO A PARLIAMENTARY CONTEMPT. SO NOW THE QUESTION IS UNDER
17 KOEHLER WHAT IS IT THAT THEY MUST DO? THEY HAVE TO TAKE A
18 POSITION HERE. AT THAT POINT THE LAWYERS CAN TAKE A POSITION
19 ABOUT THERE BEING CONFLICT.

20 IF FACEBOOK WANTS TO AND I THINK THIS IS THE POINT
21 THAT WAS JUST MADE TO YOU. IF FACEBOOK WANTS TO WAIVE AT
22 LEAST ITS POSITIONS ON CONTEMPT AT LEAST AS AGAINST THE
23 LAWYERS FOR SIX4THREE SO THAT THEY COULD PROCEED KNOWING THAT
24 THEY'RE NOT GOING TO END UP HURTING THEMSELVES, THEN THEY'VE
25 GOT TO DO THAT. THEY CAN'T HAVE IT BOTH WAYS.

26 I THINK THAT'S WHAT'S PRETTY CLEAR AT THIS POINT,

1 YOUR HONOR. THEY CAN'T SAY RUSH RUSH RUSH, GIVE US WHAT WE
2 WANT. BUT BY THE WAY WE'RE RESERVING ALL OUR RIGHTS TO
3 CLOBBER THE LAWYERS, THE COMPANY, AS WELL AS THE PEOPLE BEHIND
4 THE COMPANY.

5 THE COURT: THERE ARE TWO ISSUES HERE BEFORE I HEAR
6 FROM MR. LERNER, MR. RUSSO. AND THEN ALSO FROM MR. MURPHY.
7 FIRST OF ALL, I'M SURE ALL COUNSEL IN THIS ROOM WILL AGREE
8 THAT VIOLATION OF THE STIPULATED PROTECTIVE ORDER AND ALSO MY
9 MOTION TO SEAL ORDER IS UNPRECEDENTED. NOTHING WITH THE SCOPE
10 OF THIS VIOLATION HAS EVER HAPPENED. IT'S NOT THERE. THERE
11 IS NO CASE LAW ON THIS. THIS IS UNPRECEDENT. THIS IS A CASE
12 OF FIRST IMPRESSION. ESPECIALLY WITH THE BREADTH OF THE
13 EFFECT OF THIS DISCLOSURE, THIS VIOLATION.

14 THIS VIOLATION HAS RESULTED IN REPEATED CIRCULATION
15 OF HIGHLY CONFIDENTIAL AND CONFIDENTIAL INFORMATION WORLDWIDE.
16 AND FACEBOOK FROM WHAT I'VE READ WANTS TO STOP THAT. THAT'S
17 THE FIRST THING THAT HAS TO BE ADDRESSED. EVERYTHING THAT
18 FLOWS FROM THIS AS TO WHETHER OR NOT THERE SHOULD BE
19 DISCIPLINE OR PUNISHMENT OR DETERMINING WHETHER THERE WAS A
20 VOLUNTARY DISCLOSURE IS SOMETHING THAT FACEBOOK IS SEEKING
21 NOW.

22 CAUGHT IN THE WAVE OF ALL OF THIS ARE THE ATTORNEYS
23 THAT REPRESENT THE RESPECTIVE PARTIES MR. SCARAMELLINO AND
24 WHILE HE'S PART OF THE LEGAL TEAM, BUT MR. KRAMER CERTAINLY.
25 AND THERE HAS TO BE SOME EXPLANATION AS TO WHY THIS HAPPENED.

26 THERE ARE LOTS OF EMAILS THAT HAVE BEEN SENT TO

1 MEMBERS OF THE PRESS, GOVERNMENTAL ENTITIES, STATES, FOREIGN
2 GOVERNMENTS MEANING GREAT BRITAIN AND COMMITTEES THEREUNDER
3 THAT ADDRESS DISCUSSIONS ON THE INFORMATION THAT'S THE SUBJECT
4 OF THIS LITIGATION TODAY. THAT IS TO SAY THE CONFIDENTIAL AND
5 HIGHLY CONFIDENTIAL INFORMATION.

6 COMMENTS HAVE BEEN MADE BY ALL PARTIES RELATING TO
7 THE INFORMATION ON FACEBOOK THAT EXISTS AND SUBJECT TO A
8 PROTECTIVE ORDER. HOWEVER, THERE HAS TO BE SOME MECHANISM TO
9 MAKE THIS PUBLIC. THAT'S WHAT THOSE EMAILS SAY. DOES ANYONE
10 DISAGREE WITH THAT? SPEAK UP NOW BECAUSE THAT'S WHAT THEY
11 SAY. AND BECAUSE OF THAT, FACEBOOK BELIEVES THAT THIS CASE
12 HAS BEEN T'D UP FOR DISCLOSURE WHICH IS MORE IMPORTANT THAN
13 SEEKING PECULIARY RECOMPENSE BY SIX4THREE AGAINST FACEBOOK.

14 MR. RUSSO: YOUR HONOR, I AM NOT HERE TO CHALLENGE
15 YOUR INTERPRETATION OF THE EMAILS OF THE DECLARATIONS. I AM
16 HERE TO SAY THE RIGHT PROCEDURE UNDER KOEHLER IS NOT TO DO A
17 PRELIMINARY HEARING TO SORT OF PREJUDGE WHAT WOULD A CRIMINAL
18 CONTEMPT PROCEEDING LOOK LIKE. WHAT WOULD A HYBRID PROCEEDING
19 LOOK LIKE. WHAT WOULD A CIVIL PROCEEDING LOOK LIKE.

20 I UNDERSTAND YOU WANT TO GET YOUR ARMS ACROSS WHERE
21 ARE THESE DOCUMENTS? WHERE ARE THEY GOING? THE REALITY IS
22 ONCE THE U.K. SUBPOENAED AND MR. KRAMER UNDER THE PAIN OF
23 CONTEMPT TURNED OVER DOCUMENTS, THE REALITY IS THEY ARE IN THE
24 CONTROL OF THE U.K. PARLIAMENT. THEY ARE NOT IN THE CONTROL
25 UNFORTUNATELY OF THIS COURT. THEY ARE NOT UNDER THE CONTROL
26 OF MR. KRAMER. THEY ARE NOT UNDER THE CONTROL OF

1 MR. SCARAMELLINO. THEY ARE NOT UNDER THE CONTROL OF THE
2 LAWYERS. THEY ARE CERTAINLY NOT IN MY CONTROL.

3 THE RIGHT PROCEDURE IS FOR FACEBOOK TO GO TO THE
4 COURTS IN THE U.K. THEY HAVE AN OFFICE IN THE U.K. THEY HAVE
5 AN EMPLOYEE WHO IS APPARENTLY PART OF THE U.K. PARLIAMENT.
6 THEY HAVE AN ACTUAL EMPLOYEE WHO IS AN OFFICER OF FACEBOOK
7 U.K. WHILE SERVING IN PARLIAMENT. THEY NEED TO GO TO THE
8 RIGHT COURT TO SAY, "THIS WAS A VIOLATION OF CONFIDENTIALITY
9 IN THIS COURT. PLEASE RESPECT THAT." AND GET A COURT IN THE
10 U.K. TO STOP WHAT'S HAPPENING.

11 THEY ARE APPARENTLY CHOOSING NOT TO DO THAT. THAT'S
12 A CHOICE THEY'VE MADE AS A PUBLIC COMPANY WEEKS AND NOW MONTHS
13 LATER. THERE'S NOTHING WE CAN DO, YOUR HONOR, FRANKLY. YOU
14 CAN ISSUE MORE ORDERS. MR. KRAMER CAN'T CAUSE SOMETHING TO
15 HAPPEN NOR CAN SIX4THREE NOR CAN MR. SCARAMELLINO NOR CAN
16 THESE LAWYERS.

17 THE REALITY RIGHT NOW IS IS THERE GOING TO BE
18 PUNISHMENT? IS THAT WHAT FACEBOOK IS AFTER? I'VE SAID THIS
19 OVER AND OVER AGAIN. WHAT'S THE END GAME? ARE THEY GOING TO
20 PUNISH THESE GENTLEMEN? LET'S GET THAT ON THE TABLE FRANKLY.
21 IF THERE IS GOING TO BE A CRIMINAL CONTEMPT PROCEEDING, LET'S
22 GET IT ON THE TABLE. LET'S GET THE CASE SET FOR TRIAL. LET'S
23 GO FORWARD IN ACCORDANCE WITH IN RE KOEHLER.

24 IF THAT'S NOT GOING TO HAPPEN, THE THREAT HAS TO
25 STOP BECAUSE THE THREAT IS WHAT'S CAUSING THE DYSFUNCTION.
26 THE CONTINUED THREATS ARE CAUSING THE DYSFUNCTION IN THE

1 LAWYERS LAWYERING UP. AND THE LAWYERS SAYING THERE'S A
2 CONFLICT BECAUSE THE LAWYERS CAN SEE. THEY'RE DRIVING RIGHT
3 TOWARDS THE STORM HERE WHICH IS IF FACEBOOK DOES FILE THAT
4 CONTEMPT PROCEEDING, WHAT THEN HAPPENS?

5 THE COURT: MR. RUSSO, YOU WEREN'T PRIVY TO THIS.
6 YOU PROBABLY READ THE TRANSCRIPT OF THE NOVEMBER 30TH, 2018,
7 HEARING.

8 MR. RUSSO: I DID. I WAS NOT THERE.

9 THE COURT: AND I HAVE IT RIGHT HERE. I ASKED
10 REPEATEDLY HOW DID MR. KRAMER RECEIVE THE UNREDACTED
11 CONFIDENTIAL INFORMATION IN ORDER TO -- FOR THAT INFORMATION
12 TO BE GIVEN ULTIMATELY TO THE DCMS WHEN HE WAS SUBJECT TO THE
13 PROTECTIVE ORDER? AND UNDER THE PROTECTIVE ORDER HE WAS NOT
14 ALLOWED TO HAVE THAT INFORMATION. SUCH THAT THIS -- SOMETHING
15 LIKE THIS WOULD NOT HAPPEN. AND THE ANSWER IS -- THERE WAS NO
16 ANSWER. COUNSEL WERE NOT ABLE TO RESPOND TO THAT QUESTION.
17 THERE WAS NO ANSWER.

18 AND TO THIS DAY THERE IS NO ANSWER AS TO WHY MY
19 ORDER OR WHY THE COURT'S ORDER WAS VIOLATED BY VIRTUE OF
20 FURNISHING UNREDACTED INFORMATION TO MR. KRAMER. HE'S NOT
21 EVEN ENTITLED TO THAT UNDER THIS STIPULATED PROTECTIVE ORDER.
22 THAT'S WHERE THE ANALYSIS STARTS. SO THAT COUPLED WITH THE
23 EMAILS WAS TROUBLING TO THE COURT. IN ANY EVENT, I WILL HEAR
24 FROM MR. LERNER.

25 MR. RUSSO: THANK YOU, YOUR HONOR.

26 MR. LERNER: THANK YOU, YOUR HONOR. EVERYTHING YOU

1 JUST HEARD ABOUT KOEHLER AND THIS CONTEMPT ISSUE BECAUSE YOUR
2 HONOR IS FAMILIAR WITH THE TRANSCRIPTS, YOU WILL RECOGNIZE YOU
3 HAVE NOW HEARD THREE TIMES. AND IT IS BECAUSE IT IS A
4 DISTRACTION AND YOUR HONOR ACCURATELY DESCRIBED EXACTLY WHAT
5 WE ARE DOING.

6 WE NEED TO FIRST AND FOREMOST FIGURE OUT WHERE OUR
7 HIGHLY CONFIDENTIAL INFORMATION IS AS A RESULT OF THE
8 VIOLATIONS OF THIS COURT'S ORDERS. AND I DEFY IN ANYONE TO
9 LOOK THROUGH THE ARGUMENTS OR REQUESTS WE HAVE BEEN MAKING FOR
10 THE LAST COUPLE OF MONTHS TO SUGGEST OTHERWISE 'CAUSE THAT'S
11 WHAT WE'VE BEEN FOCUSED ON AND THAT'S WHAT YOUR HONOR HAS BEEN
12 DOING.

13 AND THE SEQUENCE OF EVENTS THAT YOUR HONOR DESCRIBED
14 IS EXACTLY ACCURATE. AND NOT SURPRISINGLY THERE'S NO CASE NOR
15 ANY LOGIC THAT WOULD SUGGEST THAT IN A SITUATION WHERE YOU
16 HAVE AN UNPRECEDENTED BREACH OF A PROTECTIVE ORDER THAT THE
17 PARTIES WOULD SUDDENLY JUMP TO AS COUNSEL IS SUGGESTING A
18 CONTEMPT HEARING AND STOP ANY OTHER DISCOVERY SO THAT THE
19 PARTY WHO IS INJURED BY THE DISCLOSURE HAS NO ABILITY TO
20 FIGURE OUT WHERE ALL THAT STUFF IS. I DON'T TO YOUR POINT
21 KNOW EVERYTHING WE'RE GOING TO LEARN, BUT I DO NEED TO FIND
22 OUT WHERE THESE DOCUMENTS ARE.

23 THAT IS MY FIRST AND MOST IMPORTANT JOB RIGHT NOW
24 AND WHAT WE'RE TRYING TO GET TO. EVERYTHING YOU JUST HEARD
25 ABOUT HAS NOTHING TO DO WITH THE WITHDRAWAL. IT HAS NOTHING
26 TO DO WITH THE DISCOVERY HEARING ON FRIDAY. IT IS A

1 DISTRACTION INTENDED TO AVOID EXACTLY WHAT YOUR HONOR. AND WE
2 HAVE BEEN TRYING TO GET TO THE BOTTOM OF WHICH IS WHERE IS
3 THIS INFORMATION?

4 ONE FINAL NOTE. EVERY TIME YOUR HONOR PROVIDES EVEN
5 A SLIGHT RAY OF SUNSHINE ON THE FACTS IN THIS CASE, THE FACTS
6 ARE DEMONSTRABLY CONTRARY TO WHAT EVERYONE HAS SAID ON THAT
7 SIDE OF THE "V" SO FAR. YOU CAN LOOK THROUGH EVERY ORDER YOU
8 HAVE GIVEN. IT ENDS UP ALWAYS BEING THE CASE. AND EVEN THE
9 RECENT DISCLOSURE WE HAD FROM STROZ FRIEDBERG. AND
10 MR. KRAMER IS HERE TODAY. HE CAN TELL US ABOUT THIS, IF HE
11 WANTS TO.

12 UNLESS I'M MISTAKEN, AS YOUR HONOR RECALLED, THE
13 DISCLOSURE IS ON NOVEMBER 21ST, RIGHT? AND WHAT YOU JUST
14 HEARD IS HE WAS SO SURPRISED. HE WENT TO LONDON, GOT A PLACE
15 ACROSS THE STREET AFTER INVITING A SUBPOENA IN THE U.S. BUT
16 SAYING, "IF I DO IT HERE, I WILL HAVE TO GET FACEBOOK
17 INVOLVED, SERVE ONE IN THE U.K." MIRACULOUSLY HE SHOWS UP
18 THERE. AND THEN EVEN THOUGH HE TAKES HIS LAPTOP AND
19 THUMB-DRIVE ACROSS THE STREET, THEY WANT YOU TO BELIEVE HE WAS
20 SOMEHOW SURPRISED AND THIS WASN'T PLANNED.

21 BUT WHAT IS STROZ FRIEDBERG ABLE TO FIND OUT WITH
22 THE VERY LIMITED INFORMATION THEY WERE ABLE TO LOOK AT THAT
23 THEY TOLD YOUR HONOR ABOUT YESTERDAY? WHAT DID HE DO THE DAY
24 BEFORE? THE DAY BEFORE HE WENT IN TO CHANGE THE PASSWORD ON
25 THE DROPBOX ACCOUNT AFTER PROVIDING YOU SWORN DECLARATIONS
26 SAYING, "I NEVER LOOKED IN THE DROPBOX ACCOUNT."

1 SO EVEN THEIR STORIES THAT THEY WANT TO TELL YOU
2 ABOUT WHERE THIS IS GOING TO GO AT THE END, NONE OF IT MATCHES
3 UP. AND EVERY TIME YOU ALLOW ANY INQUIRY INTO THIS, WE LEARN
4 MORE ABOUT IT. AND WE ON FACEBOOK'S SIDE OF THE "V" IS
5 ABSOLUTELY CORRECT. WE'RE TRYING TO FIGURE OUT WHERE THIS
6 STUFF IS.

7 THE COURT: I THINK WE'RE DELVING INTO THE
8 CONFIDENTIAL ASPECT OF THE CASE. WE NEED TO STOP. THAT'S NOT
9 THE PURPOSE OF THIS HEARING TODAY. ALL I'M SAYING IS THAT
10 THERE ARE TROUBLING ISSUES CONCERNING THE CIRCULATION OF THIS
11 DATA. AND IT WAS SUBJECT TO ORDERS THAT THE COURT ISSUED.

12 AND THERE WAS NO UNDERSTANDING BY THIS COURT AS TO
13 HOW THIS INFORMATION WAS GIVEN TO MR. KRAMER SUCH THAT
14 MR. KRAMER DISCLOSED IT. THAT'S WHAT TROUBLES ME.

15 MR. RUSSO, I HAVE A QUESTION FOR YOU REGARDING YOUR
16 REPRESENTATION. MR. MURPHY.

17 MR. MURPHY: YOUR HONOR.

18 THE COURT: YES.

19 MR. MURPHY: I HATE TO INTERRUPT, IF I COULD REPLY?

20 THE COURT: YES.

21 MR. MURPHY: IT IS OUR MOTION. MOTION TO BE
22 RELIEVED. I WANT TO BRING IT BACK TO THAT.

23 THE COURT: YES.

24 MR. MURPHY: AND I KNOW THAT COUNSEL ESPECIALLY
25 MR. LERNER HAS RAISED ISSUES THAT I ACTUALLY TAKE OFFENSE TO
26 HIS SUGGESTION I HAVE SOMEHOW, MR. LASSART AND PEOPLE FROM MY

1 OFFICE MAY HAVE MISLED THE COURT. WE'RE ONLY HEAR ON THE
2 ISSUE OF THE MOTION TO BE RELIEVED. IT'S A SIMPLE MOTION.
3 WHAT'S UNUSUAL ABOUT THE MOTION IS THAT IT'S NOT BEING OPPOSED
4 BY THE CLIENT. IT'S BEING OPPOSED BY THE ADVERSARY.

5 AND FOR MR. LERNER TO SUGGEST THAT THERE IS NO
6 CONFLICT, IGNORES WHAT HE JUST ARGUED. IT IGNORES THE
7 ALLEGATIONS SET FORTH IN HIS OPPOSITION THAT MY CLIENT AIDED
8 AND ABETTED OR CONSPIRED WITH ITS CLIENT TO VIOLATE THE COURT
9 ORDER. THERE'S THE CONFLICT RIGHT THERE.

10 AND I SET FORTH IN MY OPENING STATEMENT. MY OPENING
11 ARGUMENT AS TO WHY THIS CONFLICT IS UNWAIVABLE. I MEAN IT'S
12 NOW DEMONSTRABLY SO BASED ON THE ARGUMENT OF COUNSEL.

13 I NEED TO JUST ADDRESS A COUPLE OF THINGS. ONE,
14 EVEN IF THE MOTION TO WITHDRAW IS GRANTED WHICH I BELIEVE IT
15 SHOULD BE BASED ON WHAT IS BEFORE THE COURT, MY CLIENT IS
16 STILL SUBJECT TO JURISDICTION. WE'RE NOT GOING TO IGNORE THE
17 JURISDICTION OF THE COURT TO OVERSEE ANY POTENTIAL SANCTIONS
18 MOTION THAT FACEBOOK MAY BRING.

19 SO WHAT'S THE PURPOSE? WHAT'S THE PURPOSE OF THEM
20 OPPOSING OUR EFFORTS TO WITHDRAW BASED ON THE CONFLICT THEY
21 HAVE RAISED? BECAUSE WE'RE THERE. WE'RE HERE. WE'LL BE
22 HERE. SO IT SEEMS TO ME UNNECESSARY FOR THEM TO ARGUE AGAINST
23 THE MOTION TO BE RELIEVED. ESPECIALLY WHEN THE CLIENT DOESN'T
24 OPPOSE IT.

25 THE COURT: ALL RIGHT. WELL, I THINK -- MR. MURPHY,
26 YOU HAD ANOTHER POINT?

1 MR. MURPHY: ONE FINAL POINT. THAT RELATED TO
2 MR. DEHAYE IN THE SUGGESTION THAT SOMEHOW DAVID GODKIN
3 CONTROLS MR. DEHAYE AND MR. DEHAYE'S FAILURE TO PROVIDE A
4 DECLARATION. MY CLIENT HAS NO CONTROL OVER MR. DEHAYE.

5 THIS MORNING I RECEIVED A COPY OF THE LETTER FROM
6 MR. DEHAYE'S LAWYER IN GREAT BRITAIN WHO SETS FORTH
7 MR. DEHAYE'S POSITION WITH RESPECT TO FACEBOOK'S CLAIM
8 RELATIVE TO THE DEHAYE PARTICIPATION AND POSSIBLY DISCLOSURE
9 OF INFORMATION.

10 IN THAT LETTER, COUNSEL POINTS OUT THAT FACEBOOK'S
11 LAWYERS WOULD NOT PROVIDE THE LETTER TO THE COURT AND
12 REQUESTED THAT THE LETTER BE PROVIDED TO THE COURT SETTING
13 FORTH MR. DEHAYE'S POSITION. I WOULD JUST REQUEST THAT I BE
14 ALLOWED TO PROVIDE THAT LETTER TO THE COURT BECAUSE I THINK
15 IT'S IMPORTANT TO CONSIDER IF THE COURT IS INCLINED TO GO
16 FORWARD ON THE CASE MANAGEMENT CONFERENCE.

17 AND, AGAIN, JUST TO CLOSE, IF THE COURT IS INCLINED
18 TO FOLLOW THROUGH WITH THIS DECISION TO DENY THE MOTION
19 WITHOUT PREJUDICE, I WOULD REQUEST THAT THE HEARINGS ON FRIDAY
20 BE DEFERRED. SO THAT THE DEFENSE CAN HAVE THE OPPORTUNITY TO
21 SEEK REVIEW BY THE COURT OF APPEAL. THANK YOU.

22 THE COURT: THANK YOU. WELL, I THINK --

23 MR. SULLIVAN: YOUR HONOR.

24 THE COURT: THERE IS ONE ISSUE THAT I'M SURE IS IN
25 THE BACK OF YOUR MIND THAT EVERYONE IS CONSIDERING WHICH IS IF
26 COUNSEL WITHDRAW, THE CORPORATION CANNOT REPRESENT ITSELF. WE

1 ALL KNOW THAT. AS A MATTER OF LAW A CORPORATION CANNOT APPEAR
2 IN PROPRIA PERSONA. AND BECAUSE OF THAT, THE ENTIRE
3 LITIGATION GRINDS TO A HALT. MASTER CANE HAD INDICATED IN HIS
4 DECLARATION THAT HE WAS THINKING ABOUT RETAINING OR BEING
5 RETAINED AS COUNSEL FOR SIX4THREE. THAT WAS WEEKS. NOW A
6 COUPLE OF MONTHS AGO AND HE HASN'T APPEARED IN THIS CASE. AND
7 THE COURT MAY HAVE TO TAKE SOME OTHER MEASURES WITH REGARD TO
8 A LITIGATION IF SIX4THREE IS UNREPRESENTED.

9 MR. MURPHY: YES, YOUR HONOR. AND I BELIEVE THAT
10 WHEN WE FIRST DISCUSSED THE ISSUE OF THE MOTION TO WITHDRAW,
11 IT WAS SET OUT FAR IN ADVANCE SO THAT SIX4THREE WOULD HAVE THE
12 OPPORTUNITY TO OBTAIN REPLACEMENT COUNSEL. ONE POTENTIAL
13 SOLUTION WOULD BE AN ORDER TO SHOW CAUSE WITH RESPECT TO
14 OBTAINING REPLACEMENT COUNSEL, GRANTING THE MOTION TO BE
15 RELIEVED, SET AN OSC OUT INTO THE FUTURE. AND IF THERE IS NOT
16 REPLACEMENT COUNSEL, THEN THE COURT CAN DO WHAT THE COURT CAN
17 DO UNDER ITS INHERENT POWER UNDER THE CODE OF CIVIL PROCEDURE
18 1204, I BELIEVE.

19 THE COURT: YES.

20 MR. MURPHY: THAT'S ONE POTENTIAL OPTION.

21 THE COURT: THANK YOU, MR. MURPHY.

22 MR. MURPHY: THANK YOU.

23 MS. MEHTA: YOUR HONOR, ON THAT POINT, I THINK WE'VE
24 CONFLATED A LOT OF DIFFERENT ISSUES HERE TODAY. I WANT TO
25 FOCUS FIRST ON THE LAST POINT FROM MR. MURPHY WITH RESPECT TO
26 THIS WITHDRAWAL QUESTION. AND THEN I WANT TO GO BACK TO THE

1 SEPARATE REQUEST FOR RELIEF IN ADVANCE OF FRIDAY'S HEARING.

2 ON THE WITHDRAWAL QUESTION, YOUR HONOR HAS HIT THE
3 NAIL IN THE HEAD IN TERMS OF THE TIMING PROBLEM. SIX4THREE
4 HAS HAD FOUR MONTHS. NEARLY FOUR MONTHS TO FIND NEW COUNSEL
5 AND THEY HAVEN'T FOUND IT. AND ALL OF THEIR SUGGESTIONS AS TO
6 WHAT THEY'VE DONE TO FIND NEW COUNSEL RAISE REAL QUESTIONS AS
7 TO WHETHER THEY'RE MAKING A GOOD FAITH EFFORT TO DO SO.

8 THEY'RE OBVIOUSLY HIGHLY INCENTIVIZED NOT TO DO SO.
9 AND THE QUESTION IS ARE WE REALLY GOING TO ALLOW THIS PROCESS
10 WHICH GOES BACK TO MR. LERNER'S POINT ABOUT NEEDING TO GET TO
11 THE BOTTOM OF WHERE OUR INFORMATION IS AND WHO HAS IT. ARE WE
12 REALLY GOING TO PUT THAT ON ICE WHILE SIX4THREE TRIES TO FIND
13 NEW COUNSEL, IF THEY'RE REALLY DOING THAT?

14 THE COMMENT TO RULE 1.16 EXPRESSLY ADDRESSED THIS
15 QUESTION. AND WHAT THE COMMENT SAYS IS "IF THE TRIBUNAL
16 DENIES A LAWYER PERMISSION TO WITHDRAW, THE LAWYER IS
17 OBLIGATED TO COMPLY WITH THE TRIBUNAL'S ORDER. THIS DUTY
18 APPLIES EVEN IF THE LAWYER SOUGHT PERMISSION TO WITHDRAW
19 BECAUSE OF A CONFLICT OF INTEREST."

20 THERE'S A MOTION TO REOPEN DISCOVERY THAT IS SET FOR
21 FRIDAY. THEY FILED AN OPPOSITION. THE LAWYERS ARE DUTY-BOUND
22 TO REPRESENT THEIR CLIENT AND SHOW UP TO THAT HEARING NOT
23 WITHSTANDING THEIR ASSERTION OF THIS UNPRONOUNCED CONFLICT
24 AND OPPOSE THAT REQUEST, IF THAT'S WHAT THEY'RE GOING TO DO.
25 AND THE COURT SHOULD DECIDE IT AND WE SHOULD MOVE FORWARD.

26 THAT ISSUE IS OF COURSE SEPARATE FROM WHAT

1 MR. LERNER IS ASKING FOR WHICH IS SIMPLY THAT YOUR HONOR
2 ENFORCE THE ORDER FROM A WEEK AND A HALF AGO ON THE EX PARTE.
3 WHAT WE STILL DON'T HAVE IS THREE THINGS WE STILL DON'T HAVE
4 THAT YOUR HONOR ORDERED.

5 THE FIRST ONE IS THERE WAS AN ALLEGED EXPERT WHO NO
6 ONE HAD HEARD ABOUT BEFORE. IT'S NOT EVEN CLEAR IF MR. GODKIN
7 KNEW ABOUT HIM BEFORE. MR. FRISSORA. MR. FRISSORA WENT TO
8 COLLEGE WITH MR. SCARAMELLINO. APPARENTLY MR. SCARAMELLINO
9 ENGAGED HIM IN THIS MATTER. HE RUNS A HEDGE FUND. I HAVE NO
10 IDEA WHAT HE POSSIBLY COULD HAVE BEEN DOING THAT COULD HAVE
11 BEEN RELEVANT TO THE MATTER.

12 BUT APPARENTLY HE WAS RETAINED AND MR. SCARAMELLINO
13 WAS WORKING WITH HIM AND HE MAY HAVE RECEIVED FACEBOOK
14 CONFIDENTIAL INFORMATION. NOTWITHSTANDING THE COURT'S ORDER
15 THAT THEY SUBMIT DECLARATIONS FROM ALL OF THESE PROPOSED
16 EXPERTS, NO DECLARATION FROM MR. FRISSORA. WE DON'T KNOW WHAT
17 HE HAD. WE DON'T KNOW IF HE STILL HAS IT. WE DON'T KNOW IF
18 HE DESTROYED ANYTHING.

19 WE HAVE NO IDEA WHAT INFORMATION MAY BE OUT IN THE
20 WILD WITH RESPECT TO HIM. THEY NEED TO SUBMIT A DECLARATION
21 FOR MR. FRISSORA. AND, IN FACT, THEY HAVEN'T EVEN EXPLAINED
22 IF THEY TRIED. WE DON'T EVEN KNOW IF THEY TRIED TO GET THAT
23 DECLARATION.

24 THE SECOND THING WE NEED IS A DECLARATION FROM
25 MR. DEHAYE. MR. DEHAYE EXPRESSLY SIGNED A PROTECTIVE ORDER
26 ACKNOWLEDGMENT SUBJECTING HIMSELF TO THIS COURT'S

1 JURISDICTION. HE NEEDS TO SUBMIT THE DECLARATION. AND WE ASK
2 FOR AN ORDER DIRECTING HIM TO DO SO.

3 AND THEN THE THIRD THING IS BECAUSE MR. SCARAMELLINO
4 APPARENTLY WAS THE ONLY ONE MANAGING MR. FRISSORA,
5 MR. SCARAMELLINO SHOULD SUBMIT A DECLARATION THAT DOES ALL OF
6 THE THINGS THAT MR. GODKIN WAS ORDERED TO DO WITH RESPECT TO
7 THE OTHER EXPERTS.

8 THOSE ARE THE THREE THINGS WE WOULD LIKE TO HAVE
9 BEFORE THE HEARING ON FRIDAY SO THAT YOUR HONOR HAS A FULL
10 PICTURE AS TO WHAT IS OUT THERE WITH RESPECT TO THESE SUPPOSED
11 EXPERTS BEFORE WE THEN TALK ABOUT THE REST OF THE ISSUES ON
12 CALENDAR FOR FRIDAY.

13 THE COURT: MR. RUSSO, I HAD A QUESTION FOR YOU.
14 YOU'RE REPRESENTING MR. KRAMER, CORRECT?

15 MR. RUSSO: INDIVIDUALLY, YES, YOUR HONOR.

16 THE COURT: AND YOU'RE REPRESENTING ALSO
17 MR. SCARAMELLINO, CORRECT?

18 MR. RUSSO: INDIVIDUALLY, YES.

19 THE COURT: MR. KRAMER IS THE PRINCIPAL FOR
20 SIX4THREE THE CORPORATION, CORRECT?

21 MR. RUSSO: MANAGING MEMBER, YES.

22 THE COURT: RIGHT. MR. SCARAMELLINO IS A MEMBER OF
23 THE BIRNBAUM GODKIN LEGAL TEAM, CORRECT?

24 MR. RUSSO: HE WAS. I UNDERSTAND THAT THEY SEVERED
25 TIES AS OF SOME DATE IN 2018 AFTER ONE OF THE HEARINGS.
26 PERHAPS ONE OF THE DECEMBER HEARINGS.

1 THE COURT: ISN'T THERE AN INHERENT CONFLICT
2 REPRESENTING BOTH MR. KRAMER AND MR. SCARAMELLINO INASMUCH AS
3 BOTH OF THEM HAVE OPPOSING RESPONSIBILITIES IN THIS
4 LITIGATION?

5 MR. RUSSO: WE'VE DISCLOSED THAT TO THEM, YOUR
6 HONOR. THEY HAVE EXPRESSLY WAIVED THAT CONFLICT AND ASKED ME
7 TO REPRESENT THEM. I UNDERSTAND THE PROBLEM. IT'S CERTAINLY
8 BEEN RAISED TO THEM. AND THEY CANNOT FRANKLY AFFORD TWO
9 SEPARATE COUNSEL IS WHAT I'VE BEEN TOLD.

10 THE COURT: THANK YOU. ALL RIGHT. ANYTHING FURTHER
11 FROM COUNSEL?

12 MR. SULLIVAN: YOUR HONOR.

13 THE COURT: MR. SULLIVAN.

14 MR. SULLIVAN: I UNDERSTAND FACEBOOK'S CONCERN.
15 THEY WANT TO KNOW WHERE THEIR DOCUMENTS ARE. MR. GROSS HERE
16 DOES NOT NEED TO BE REPRESENTING SIX4THREE TO MAKE THAT
17 HAPPEN. AS YOU CAN SEE FROM THE EMAILS THAT WERE ATTACHED TO
18 THE OPPOSITION OF THE MOTION TO WITHDRAW, NONE OF THEM DEALT
19 WITH MR. GROSS. SO HE'S ALSO JUST LOCAL COUNSEL IN THIS
20 MATTER, SO I WOULD LIKE HIM TO BE RELIEVED OF HIS
21 RESPONSIBILITIES AS BEING COUNSEL FOR SIX4THREE.

22 IT'S NOT GOING TO DELAY FACEBOOK. HE ONLY GOT
23 COPIED ON SOME OF THE EMAILS. HE'S NOT A BIG PLAYER AND
24 SHOULD BE RELIEVED. THANK YOU.

25 THE COURT: ALL RIGHT.

26 MR. MURPHY: NOT TO ARGUE, YOUR HONOR.

1 THE COURT: YES, SIR.

2 MR. MURPHY: ONE POINT OF CLARIFICATION. WITH
3 RESPECT TO THE NOTICE OF ERRATA DECLARATION FOR DAVID GODKIN.

4 THE COURT: YES.

5 MR. MURPHY: THE NOTICE OF ERRATA WAS JUST TO
6 INCLUDE THE EXHIBITS REFERENCED IN THE DECLARATION?

7 THE COURT: CORRECT, BECAUSE THEY WERE NOT INCLUDED.
8 THIS IS THE SEPTEMBER 21ST, 2018, DECLARATION.

9 MR. MURPHY: OKAY.

10 THE COURT: AS THE DECLARATION OF DAVID GODKIN IN
11 SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS.

12 MR. MURPHY: OKAY. SO THAT'S THE 9-21-18
13 DECLARATION?

14 THE COURT: THAT'S CORRECT.

15 MR. MURPHY: THANK YOU, YOUR HONOR.

16 THE COURT: VERY WELL. THAT'S GOT TO BE FILED
17 REGARDLESS OF WHAT THE COURT IS GOING TO DO. SUBMITTED,
18 COUNSEL?

19 MR. MURPHY: YES, YOUR HONOR.

20 MS. MEHTA: YES, YOUR HONOR.

21 MR. RUSSO: YOUR HONOR, I DID WANT TO SAY THERE IS
22 ONE CASE THAT HAS SOME SIMILARITY TO THIS CASE. IT'S A
23 FEDERAL CASE. I WAS TRYING TO PUT MY FINGER ON IT AS YOU
24 RAISED THE QUESTION. IT WAS DECIDED I BELIEVE IN THE SAN JOSE
25 DISTRICT COURT. I CAN TRY TO GET THAT CITATION FOR YOU.

26 I THOUGHT I HAD IT IN THIS BINDER AND I FLIPPED

1 THROUGH IT AND I DIDN'T FIND IT WHERE THE COURT HAD A
2 VIOLATION OF A STIPULATED PROTECTIVE ORDER. DOCUMENTS GOT
3 OUT. THEY WERE MADE PUBLIC. AND THE COURT WAS FACED WITH
4 WHAT DO WE DO NOW THAT THERE'S PUBLIC DOCUMENTS?

5 AND IN THAT CASE LIKE THIS ONE THE DOCUMENTS HAD A
6 CERTAIN PUBLIC INTEREST, WHICH OBVIOUSLY FACEBOOK DOESN'T
7 DISPUTE. THERE'S A PUBLIC INTEREST HERE. THE U.K. HAS
8 INVESTIGATED. A LOT OF THINGS HAVE HAPPENED.

9 I WOULD LIKE YOUR HONOR IN RE KOEHLER WHICH, YOU
10 KNOW, IS AT 181 CAL. APP. 4TH, 1153 FROM 2010. I'D LIKE YOU
11 TO GET THAT CASE. AND I CAN PUT MY FINGER ON IT MAYBE BY
12 BEFORE NOON AND GET IT FOR YOU.

13 THE COURT: WOULD YOU BE SO KIND TO FURNISH COPIES
14 TO EVERYONE?

15 MR. RUSSO: OF COURSE.

16 THE COURT: YES. THANK YOU.

17 MR. LERNER: YOUR HONOR, THIS IS AGAIN REPEATING
18 EXACTLY WHAT YOU HEARD BEFORE TO BE RESPECTFUL OF YOUR TIME.
19 IT'S THE SAME FEDERAL COURT OPINION. THE DECISION BY
20 JUDGE COUSINS. IT DOES INVOLVE DOCUMENTS. IT INVOLVES A
21 POLICE VIDEOTAPE. IT IS NOT LIKE THIS ONE. BUT INsofar AS IF
22 YOU DO REVIEW IT, YOU WILL FIND SIGNIFICANT SANCTIONS AGAINST
23 THE ATTORNEYS.

24 THE COURT: OKAY. VERY WELL. THANK YOU.
25 SUBMITTED, COUNSEL?

26 MR. LERNER: YES.

1 MR. MURPHY: YES.

2 THE COURT: THE COURT IS GOING TO VACATE ITS RULING.
3 I WILL CONSIDER THAT AN ADVISORY RULING WITH REGARD TO THE
4 DENIAL OF THE MOTION TO WITHDRAW AS COUNSEL OF RECORD. WHAT
5 THE COURT IS GOING TO DO IS TO REVIEW WHAT HAS BEEN DISCUSSED
6 TODAY. AND I WILL TAKE THIS MATTER UNDER SUBMISSION.

7 THE HEARINGS ON FRIDAY SHALL REMAIN ON CALENDAR
8 PENDING MY RULING WITH REGARD TO THE MOTIONS TO WITHDRAW TAKEN
9 UNDER SUBMISSION. MR. MURPHY.

10 MR. MURPHY: JUST A POINT OF CLARIFICATION. STILL
11 FILE THE DECLARATION?

12 THE COURT: ABSOLUTELY. NOTWITHSTANDING WHAT I DO
13 HERE TODAY, I DO WANT ALL THE EXHIBITS FILED TODAY
14 ELECTRONICALLY AND SERVED ON EVERYONE WITH A NOTICE OF ERRATA.

15 MR. MURPHY: THANK YOU. AND, SECONDLY, YOUR HONOR,
16 IF THE COURT IS INCLINED TO GO FORWARD ON FRIDAY AND THE
17 MOTION TO WITHDRAW IS DENIED, CAN MY CLIENT APPEAR
18 TELEPHONICALLY?

19 THE COURT: YES.

20 MR. MURPHY: THANK YOU.

21 MS. MEHTA: YOUR HONOR, AT THE RISK OF TESTING
22 YOUR PATIENCE, I JUST HAVE TO FOLLOW UP ON MR. FRISSORA AND
23 MR. DEHAYE. AGAIN, WE JUST DON'T KNOW WHAT'S GOING ON WITH
24 OUR DOCUMENTS THAT ARE OUT THERE. AND ALL WE'RE ASKING FOR IS
25 COMPLIANCE WITH THE PRIOR ORDER WITH RESPECT TO THOSE TWO
26 INDIVIDUALS.

1 THE COURT: ALL RIGHT. I WILL MAKE THAT ORDER. THE
2 ALLEGED EXPERTS MR. FRISSORA AND MR. DEHAYE SHALL FILE
3 DECLARATIONS WITH REGARD TO THE DOCUMENTS IN THIS CASE AS
4 ARTICULATED BY COUNSEL FOR FACEBOOK.

5 ALSO, MR. SCARAMELLINO SHOULD EXECUTE A DECLARATION
6 IN RELATION TO THAT PROTECTIVE ORDER AS WELL. SO THESE ARE
7 THE DECLARATIONS OR CERTIFICATIONS THAT ARE ATTACHED TO THE
8 2016 PROTECTIVE ORDER. OKAY.

9 DOES EVERYONE UNDERSTAND THAT? THAT IS SO
10 ORDERED. AND THAT WILL BE DEMANDED NOTWITHSTANDING WHAT I'M
11 DOING TODAY, SO I'M TAKING THIS MATTER OTHERWISE UNDER
12 SUBMISSION. THANK YOU VERY MUCH, EVERYONE. COURT IS IN
13 RECESS.

14 MS. MEHTA: THANK YOU, YOUR HONOR.

15 MR. MURPHY: THANK YOU, YOUR HONOR.

16 MR. RUSSO: YOUR HONOR, I DO HAVE THE CITATION FOR
17 YOU. THE HARMON CASE. IT'S HARMON V. CITY OF SANTA CLARA.
18 323 F.R.D. 617, NORTHERN DISTRICT OF CALIFORNIA, 2018. 323
19 F.R.D. 617.

20 THE COURT: THANK YOU.

21 MR. RUSSO: WE CAN GET YOU A COPY AND SEND IT TO
22 YOU, IF YOU'D LIKE.

23 THE COURT: VERY WELL. AND CERTAINLY COPY ALL
24 COUNSEL IN THE COURTROOM.

25 MR. RUSSO: YES, WE WILL. THANK YOU, YOUR
26 HONOR.

1 THE COURT: THANK YOU, MR. RUSSO. THANK YOU,
2 EVERYONE.

3 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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1 STATE OF CALIFORNIA)

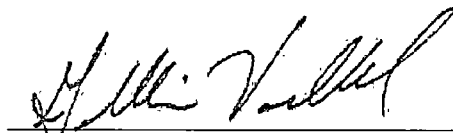
2) SS.

3 COUNTY OF SAN MATEO)

4 I, GERALDINE VANDEVELD, OFFICIAL COURT REPORTER,
5 COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DO HEREBY CERTIFY:

6 THAT THE FOREGOING CONTAINS A TRUE, FULL AND CORRECT
7 TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE
8 WITHIN-ENTITLED MATTER THAT WERE REPORTED BY ME AT THE TIME
9 AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED BY ME OR AT MY
10 DIRECTION INTO LONGHAND TYPEWRITING AND THAT THE SAME IS A
11 CORRECT TRANSCRIPT OF THE PROCEEDINGS.

12 DATED: MARCH 14, 2019

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15 GERALDINE VANDEVELD, C.S.R. #8634
16 OFFICIAL COURT REPORTER
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EXHIBIT 3

1 James A. Murphy - 062223
JMurphy@mpbf.com
2 Joseph S. Leveroni - 304721
JLeveroni@mpbf.com
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3 88 Kearny Street, 10th Floor
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Telephone: (415) 788-1900
4 Facsimile: (415) 393-8087

5 Attorneys for Plaintiff's Counsel
David Godkin (Admitted Pro Hac Vice)
Birnbaum & Godkin, LLP
6 280 Summer Street
Boston MA 02210
Telephone: (617) 307 6100
7 Facsimile: (617) 307 6101

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN MATEO**

11 SIX4THREE, LLC,

12 Plaintiff,

13 v.

14 FACEBOOK, INC., a Delaware Corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual; SAMUEL
15 LESSIN, an individual; MICHAEL VERNAL, an
individual; ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

16 Defendants.

Case No.: CIV533328

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
BIRNBAUM & GODKIN, LLP'S MOTION
TO BE RELIEVED AS COUNSEL FOR
PLAINTIFF SIX4THREE, LLC**

Date: December 17, 2018
Time: 9:00 a.m.
Dept.: 23 (Hon. V. Raymond Swope)

17 BIRNBAUM & GODKIN, LLP ("B&G"), and its attorneys, request entry of an order relieving
it (including David S. Godkin and James Kruzer) as counsel for Plaintiff SIX4THREE, LLC
18 ("SIX4THREE") in this matter pursuant to California Code of Civil Procedure section 284(2). The Court
19 may allow withdrawal of counsel and counsel may request permission to withdraw if good cause exists
20 pursuant to one or more of the grounds identified in California Rules of Professional Conduct,
specifically Rule 3-700(B)(2) and, in the alternative, Rule 3-700(C)(2), and the client has not consented
21 to the withdrawal after receiving counsel's request.

1 In short, the recent events in the above referenced matter, specifically Defendant
2 FACEBOOK's allegations against both Plaintiff *and* Plaintiff's counsel and their attempts to direct
3 discovery requests at B&G and Mr. Godkin, separate and apart from its client, have created an un-
4 waivable conflict of interest between B&G and SIX4THREE, such that B&G is not permitted under
5 the ethical rules of either Massachusetts or California to continue to represent SIX4THREE in this
6 matter.

7 Further, the nature of the allegations FACEBOOK has made against Plaintiff and Plaintiff's
8 counsel has, aside from creating an un-waivable conflict of interest between attorney and client, also
9 caused a breakdown in the relationship between attorney and client.

10 The attorney-client relationship and corresponding privileges and ethical duties arising out of
11 that sacrosanct relationship require that specific facts which give rise to this Motion are confidential and
12 required to be kept confidential pursuant to California Business & Professions Code §6068(e), California
13 Rule of Professional Conduct 3-100(A), and by the attorney-client privilege. (Cal. Evid. Code §§950 *et*
14 *seq.*)

15 In *Aceves v. Superior Court*, the California Court of Appeal, Fourth District, reviewed and upheld
16 a motion to be relieved as counsel filed under very similar circumstances. (*Aceves v. Superior Court*
17 (1996) 51 Cal.App.4th 584.) The attorney in the underlying matter moved to be relieved as counsel based
18 on the manifestation of an actual, un-waivable conflict between he and his client which "resulted in a
19 complete breakdown in the attorney-client relationship," where, as here, the attorney-client privilege
20 prevented the attorney from providing detailed grounds for the conflict, beyond his good faith
21 representations to the court that such a conflict did in fact exist. (*Aceves v. Superior Court* (1996) 51
22 Cal.App.4th 584.) Citing *Uhl v. Municipal Court*, the Court of Appeal held that, for the purposes of a
23 motion to withdraw, the attorney's representations to the court were sufficient to warrant relief
(withdrawal) where the attorney described the conflict as one that, among other things, had "resulted in
the complete breakdown in the attorney client relationship." (*Id.* at 592, citing *Uhl v. Municipal Court*,
supra, 37 Cal.App.3d at 528.)

1 As the Court is aware, Defendant alleges that the recent developments regarding the release of
2 documents was perpetrated not by SIX4THREE alone, but by SIX4THREE and B&G as co-
3 conspirators. Defendant has further alleged that B&G has made false statements to the Court. Despite
4 the fact that B&G has expressly denied, and continues to deny, these allegations, the allegations have
5 nevertheless placed the personal interests of B&G at direct odds with SIX4THREE, which is now not
6 just a client, but an alleged co-conspirator. Withdrawal in mandatory under these circumstances.

7 As noted above, B&G's duty to protect the attorney-client privilege prevents disclosure of
8 certain further details regarding this conflict of interest beyond B&G's good faith representations that
9 such a conflict indeed exists and has subsequently caused a complete breakdown in the attorney client
10 relationship between B&G and SIX4THREE, LLC. As the court in *Aceves* held:

11 Where as here the duty not to reveal confidences prevented counsel from
12 further disclosure and the court accepted the good faith of counsel's
13 representations, the court should find the conflict sufficiently established
14 and permit withdrawal. (*Id.*, citing *Uhl v. Municipal Court*, supra, 37
15 Cal.App.3d at 527-528 and *Leveresen v. Superior Court*, supra, 34 Cal.3d
16 at 539.)

17 It was reasonably foreseeable that the various accusations and their logical defenses would,
18 aside from creating an obvious conflict of interest between attorney and client, also lead to a
19 breakdown of the attorney-client relationship. Whereas the creation of an un-waivable conflict between
20 attorney and client is itself enough to cause a breakdown in the attorney-client relationship, the specific
21 nature of the accusations being lodged by FACEBOOK certainly places a strain on the ease of
22 communication that the attorney-client relationship demands.

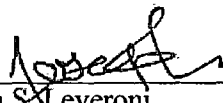
23 B&G submit that the very nature of Defendant's allegations against Plaintiff and Plaintiff's
counsel, coupled with the fact that Defendant has directed discovery requests directly at Plaintiff's
counsel, separate and apart from the client, constitute a prima facie case of an un-waivable conflict
between attorney and client. B&G further submit that under *Aceves* and the cases cited therein, the
court has sufficient information to grant B&G's motion to be relieved as counsel. However, in the
event that the Court desires further information to ascertain the good faith basis for this motion and for

1 withdrawal, it is requested that the Court have an *in camera* hearing outside of the presence of all other
2 parties so that any information demonstrating good cause for this withdrawal which counsel can
3 disclose may be supplied to the Court. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal. App. 4th
4 1128, 1136-1137.)

5 Of course, if relieved, counsel will continue to be bound by all protective orders and court
6 orders issued in this matter pursuant to Rule 3-700(D)(1).

7 Dated: January 8, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

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9 By 
10 Joseph S. Leveroni
11 Attorneys for Birnbaum & Godkin, LLP
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CERTIFICATE OF SERVICE

I, Jennifer Cuellar, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108.

On January 8, 2019, I served the following document(s) on the parties in the within action:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF BIRNBAUM &
GODKIN, LLP'S MOTION TO BE RELIEVED AS COUNSEL FOR PLAINTIFF
SIX4THREE, LLC**

NOTICE OF MOTION AND MOTION TO BE RELIEVED AS COUNSEL

**DECLARATION IN SUPPORT OF ATTORNEY'S MOTION TO BE RELIEVED AS
COUNSEL**

ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL

X	VIA MAIL: I am familiar with the business practice for collection and processing of mail. The above-described document(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at San Francisco, California on this date, addressed as listed below.
---	---

Six4Three, LLC
1267 Chestnut Street, Apt. 6
San Francisco, CA 94109

Six4Three, LLC
2098 8th Avenue, 51
New York, NY 10026

X	VIA HAND: The above-described document(s) will be placed in a sealed envelope which will be hand-delivered on this same date by ____, addressed as listed below.
---	---

X	VIA OVERNIGHT SERVICE: The above-described document(s) will be delivered by overnight service, to the addresses listed below.
---	--

Superior Court of California County of San Mateo
Department 23
400 County Center
Redwood City, CA 94063

X	VIA E-MAIL: I attached the above-described document(s) to an e-mail message, and invoked the send command at approximately ____ AM/PM to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is jcuellar@mpbf.com
---	--

1 Computer Law Group, LLP
2 401 Florence Street
3 Palo Alto, CA 94301
4 Email: jrusso@computerlaw.com
5 csargent@computerlaw.com

Attorneys for Theodore Kramer and Thomas
Scaramellino

6 Joshua H. Lerner - jlerner@durietangri.com
7 Sonal N. Mehta - SMehta@durietangri.com
8 Laura Miller - LMiller@durietangri.com
9 Catherine Kim - ckim@durietangri.com
10 Durie Tangri
11 217 Leidesdorff Street
12 San Francisco, CA 94111
13 Email: SERVICE-SIX4THREE@durietangri.com

Attorneys for Facebook, Inc.

14 I declare under penalty of perjury under the laws of the State of California that the foregoing is
15 a true and correct statement and that this Certificate was executed on January 8, 2019.

16 By _____

17 Jennifer Cuellar

EXHIBIT 4

1 James A. Murphy - 062223
JMurphy@mpbf.com
2 Joseph S. Leveroni - 304721
JLeveroni@MPBF.com
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6 Attorneys for Third Parties
BIRNBAUM & GODKIN, LLP

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8 Donald.sullivan@wilsonelser.com
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10 Telephone: (415) 625-9249
Facsimile: (415) 434-1370

11 Attorneys for Third Parties
12 GROSS & KLEIN LLP

13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SAN MATEO**
16

17 SIX4THREE, LLC, a Delaware limited liability
company,

18 Plaintiff,

19 v.
20

21 FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
22 CHRISTOPHER COX, an individual; JAVIER
OLIVAN, an individual; SAMUEL LESSIN, an
individual; MICHAEL VERNAL, an individual;
23 ILYA SUKHAR, an individual; and DOES 1-50,
inclusive,

24 Defendants.
25

Case No.: CIV 533328

**Assigned for all purposes to Hon. V.
Raymond Swope, Dept. 23**

**EX PARTE APPLICATION TO STAY
DISCOVERY**

Date: March 28, 2019
Time: 10:00 a.m.
Dept.: 23
Judge: Hon. V. Raymond Swope
Trial Date: April 25, 2019

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

2 **PLEASE TAKE NOTICE** that on the above date and time, or as soon thereafter as the matter
3 may be heard, in Department 23 of the above-entitled court, located at 400 County Center, Redwood
4 City, CA 94063, BIRNBAUM & GODKIN, LLP ("B&G") and GROSS & KLEIN, LLP ("G&K";
5 collectively "COUNSEL"), Counsel for Plaintiff SIX4THREE, LLC ("SIX4THREE"), will and hereby
6 does apply *ex parte* for an order staying the Court's March 15, 2019 Order Re: Defendant Facebook
7 Inc.'s Motion to Open Discovery And To Compel and all other discovery directed at COUNSEL and
8 SIX4THREE, pending the Court's decision on COUNSEL's motion to be relieved as counsel, taken
9 under submission on March 13, 2019, and pending the determination of the writ COUNSEL intends to
10 file challenging the Court's March 15, 2019 Order. A stay of discovery concerning the writ would
11 necessarily include the determination of whether the writ would issue, as well as the duration of the writ
12 review assuming the writ is accepted by the Court of Appeal.

13 The application is brought on the ground that good cause exists to stay discovery directed at
14 COUNSEL and SIX4THREE pending a decision by this Court on the motion to be relieved as counsel
15 pursuant to Code of Civil Procedure, section 2019.020, taken under submission on March 13, 2019. On
16 March 22, 2019, COUNSEL filed an *ex parte* application requesting leave to supplement the motion to
17 be relieved as counsel with new information that was not available at the time of the filing of the motion
18 or the hearing. The Court has not ruled on the pending *ex parte* application.

19 In short, the Court's March 15, 2019 order reopens discovery and allows Defendant
20 FACEBOOK, INC. ("FACEBOOK") to conduct discovery concerning "the revealing or discussing of
21 Facebook's confidential information pursuant to Stipulated Protective Order, paragraph 6 and
22 disclosures or providing thereof," including discovery of attorney-client communications between
23 SIX4THREE and its counsel. Through the Court Order finding that the crime/fraud exception applies,
24 FACEBOOK is presently permitted to conduct discovery proceedings for the purposes of investigating
25 allegations made by FACEBOOK against not only Plaintiff SIX4THREE, but against Plaintiff's counsel,
26 B&G and S&K. Under such circumstances, COUNSEL now has interests in the underlying matter that
27 may be at odds with the interests of its client, SIX4THREE. Under Rules of Professional Conduct Rule
28 1.16, where such an un-waivable conflict of interest exists between attorney and client, withdrawal is

1 not merely permissive, it is mandatory.

2 Given the unquestionable conflict that has been created between COUNSEL and its client,
3 COUNSEL is legally and ethically barred from advising or representing SIX4THREE under any
4 circumstances, and certainly under the current circumstances where there are pending discovery requests
5 being directed at both COUNSEL and its client regarding the very allegations that have created the
6 conflict now at issue. Further, the Court Order permits the taking of COUNSEL's depositions. Because
7 the conflict between attorney and client prevents such representation in the pending expedited discovery
8 proceedings, COUNSEL requests that the Court stay said proceedings until such time as the Court rules
9 on the pending motion to be relieved as counsel.

10 The application is necessary because it will not be possible for discovery to continue while
11 Plaintiff SIX4THREE is effectively proceeding in *propria persona* due to the fact that COUNSEL is
12 now legally and ethically barred from providing counsel in these proceedings. Of course, as a
13 corporation, SIX4THREE cannot proceed in *propria persona* and needs to secure independent counsel
14 in order to engage in the ongoing discovery, and COUNSEL requests that the court stay discovery until
15 such time as all parties are represented by independent counsel.

16 Further, the application for an order staying discovery is necessary because COUNSEL intends
17 to file a writ challenging the March 15, 2019 Court Order reopening discovery and allowing discovery
18 of attorney-client communications. Allowing discovery to proceed concerning attorney-client
19 communications whilst the writ is pending challenging the order allowing for the discovery of such
20 communications is incompatible. Should the appellate court determine that the Court Order was in error
21 and that the crime/fraud exception is not applicable, there would be no way to un-ring the bell. The
22 attorney-client communications would already be disclosed and there would be no way to undo the
23 discovery of such information. In short, given the sanctity of the attorney-client privilege and the
24 potential to incorrectly eviscerate the attorney-client privilege to which there would be no remedy, the
25 prudent course of action to ensure that no permanent harm is done to SIX4THREE and COUNSEL is to
26 grant a stay of the March 15, 2019 order and of related discovery.

27 COUNSEL respectfully requests that the Court grant COUNSEL's request for an order staying
28 the March 15, 2019 Order and any discovery directed at SIX4THREE and COUNSEL pending a

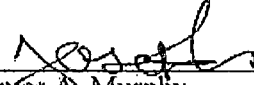
1 determination of the motion to be relieved as counsel and the duration of the writ.

2 This Application is based on the Application itself; the Memorandum of Points and Authorities
3 and the statutory and case law cited therein; the Declaration of Joseph S. Leveroni; the pleadings,
4 records, and papers on file in this action; and other oral and documentary evidence as may be presented
5 at the time of hearing.

6 Pursuant to California Rules of Court, Rules 3.1203 and 3.1204, COUNSEL gave timely notice
7 of its intent to present this *ex parte* application to all counsel of record by email on Monday, March 25,
8 2019. (Declaration of Joseph S. Leveroni ("Leveroni Decl.,").

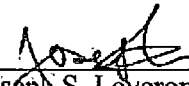
9
10 DATED: March 27, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

11
12
13 By 
14 James A. Murphy
15 Joseph S. Leveroni
16 Attorneys for Defendant
17 BIRNBAUM & GODKIN, LLP

18
19 DATED: March 27, 2019

WILSON ELSE

20 By 
21 Joseph S. Leveroni signing for
22 Donald P. Sullivan
23 Attorneys for GROSS & KLEIN, LLP
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF BIRNBAUM &**
2 **GODKIN'S REQUEST STAY MARCH 15, 2019 ORDER AND ALL DISCOVERY REQUESTS**
3 **DIRECTED AT COUNSEL**

4 COUNSEL moves for an order staying the March 15, 2019 Order Re: Defendant Facebook Inc.'s
5 Motion to Open Discovery and to Compel and any discovery requests directed at COUNSEL pending a
6 determination of COUNSEL's motion to be relieved as counsel, taken under submission on March 13,
7 2019, and for the duration of the writ COUNSEL intends to file challenging the March 15, 2019 Order
8 and determination that the crime/fraud exception applies to this circumstances of this case. A stay of
9 discovery prevents COUNSEL from further advisement or representation of Plaintiff SIX4THREE.

10 **I. RELEVANT FACTS**

11 On March 15, 2019, while COUNSEL's motion to be relieved as counsel was under submission
12 with the Court, the Court granted, in part, and denied, in part, FACEBOOK's Motion to Open Discovery
13 and to Compel. Specifically, the Court ruled that the "opening of discovery is limited to the revealing or
14 discussing of Facebook's confidential information pursuant to Stipulated Protective Order, paragraph 6
15 and disclosures or providing thereof." The Court granted FACEBOOK leave to serve requests for
16 production or subpoena *duces tecum*, whichever is the appropriate method, on Mr. Gross, Mr. Godkin,
17 Mr. Kramer, and Mr. Scaramellino, as set forth in Exhibit A to the order. The Court further ordered that
18 the attorney-client privilege is waived pursuant to the crime-fraud exception.

19 As discussed in the previous request to stay discovery and the motion to be relieved as counsel,
20 FACEBOOK's allegations against both Plaintiff and its counsel have placed COUNSEL in a conflicted
21 position with its client which requires mandatory withdrawal by counsel. The same concerns warranting
22 the Court *sua sponte* on January 16, 2019 to vacate the re-opening of discovery, including the depositions
23 of SIX4THREE and its counsel and the production of documents, are equally present here. Given the
24 conflict, SIX4THREE cannot comply with such requests with the advice of present counsel.

25 **II. LEGAL ANALYSIS**

26 **A. Counsel Has Fully Complied With California Rules Of Court, Rules 3.1202, 3.1204 And 3.1204:**

27 Rule 3.1202(c) of the California Rules of Court provides that an ex parte application may be
28 granted upon a showing of "of irreparable harm, immediate danger, or any other statutory basis for

1 granting relief ex parte.”

2 Rule 3.1203 of the California Rules of Court provides that “[a] party seeking an ex parte order
3 must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a
4 showing of exceptional circumstances that justify a shorter time for notice.”

5 Rule 3.1204(b) of the California Rules of Court provides that an ex parte application must be
6 accompanied by a declaration regarding notice that states:

7 (1) The notice given, including the date, time, manner, and name of
8 the party informed, the relief sought, any response, and whether opposition
9 is expected and that, within the applicable time under rule 3.1203, the
applicant informed the opposing party where and when the application
would be made;

10 (2) That the applicant in good faith attempted to inform the opposing
11 party but was unable to do so, specifying the efforts made to inform the
opposing party; or

12 (3) That, for reasons specified, the applicant should not be required to
13 inform the opposing party.

14 There is good cause to grant this *ex parte* application under Rule 3.1202(c) of the California
15 Rules of Court. First, unless the Court grants this *ex parte* application, COUNSEL will be forced into
16 the untenable position of remaining as counsel for SIX4THREE in this matter while being legally and
17 ethically barred from advising its client or representing the client in any way. The pending discovery
18 proceedings cannot move forward if SIX4THREE is without counsel and, given the conflict created by
19 FACEBOOK’s allegations against Plaintiff and its counsel, COUNSEL is now legally and ethically
20 barred from further consultation with SIX4THREE under Rules of Professional Conduct 1.16. The
21 March 15, 2019 Court Order reopened discovery and permits the taking of SIX4THREE and its counsels’

22 As explained above, the accusations by FACEBOOK and the resulting discovery requests
23 directed at COUNSEL and its client have created an un-waivable conflict between attorney and client.
24 The nature of the allegations is such that FACEBOOK has invoked the crime-fraud exception under
25 Evidence Code 956. The March 15, 2019 Court Order found that the crime/fraud exception applied to
26 the allegations set forth by FACEBOOK and waived the attorney-client privilege on that basis. Clearly,
27 these allegations put the interests of COUNSEL at odds with the interests of its client, and withdrawal is
28 mandatory. Allowing discovery from both SIX4THREE and COUNSEL to proceed after waiving the

1 attorney-client privilege before ruling on the motion to be relieved as counsel puts COUNSEL in an
2 untenable and conflicted position, wherein it cannot represent SIX4THREE while also being a third party
3 witness.

4 Staying the discovery order will allow the Court to decide the motion to withdraw as counsel and
5 allow SIX4THREE to obtain counsel that is not conflicted. After all, the limited scope of discovery
6 permitted by the March 15, 2019 Court Order pertains to the identical attorney-client privilege issues
7 that were raised by FACEBOOK's allegations that created the necessity for COUNSEL to withdraw as
8 counsel in the first place. Pending a decision on the motion to withdraw, SIX4THREE is effectively
9 without representation throughout these expedited discovery proceedings due to the conflict arising
10 between attorney and client. To avoid such a situation, COUNSEL respectfully requests that the Court
11 rule on COUNSEL's motion to be relieved as counsel and stay discovery proceedings until such time as
12 all parties are represented by independent counsel and discovery can resume.

13 Further, Pursuant to Rule 1.9, even after withdrawal, COUNSEL will be subject to the orders of
14 this Court with regards to the management of all papers, filings, and documents in the above-titled
15 matter.

16 Finally, good cause exists to stay the discovery order pending the determination of the writ
17 COUNSEL intends to file challenging that very order. Permitting the depositions of SIX4THREE and
18 its counsel, as well as the production of documents, based on the Court Order waiving the attorney-client
19 privilege based on the crime/fraud exception while the writ is pending would in effect deny COUNSEL
20 an effective ruling of its writ challenging the Court Order applying the crime/fraud exception to the case
21 at bar. Pursuant to Code of Civil Procedure § 2031.060(b), the "court, for good cause shown, may make
22 any order that justice requires to protect any party or other person from unwarranted annoyance,
23 embarrassment, or oppression, or undue burden and expense." The requirement that SIX4THREE and
24 COUNSEL disclose attorney-client communications while a challenge to Court Order waiving the
25 attorney-client privilege is pending acceptance of the writ and determination by the Court of Appeal
26 would in itself constitute "annoyance, embarrassment, or oppression," which the Court is expressly
27 empowered to prevent. *Rosemont v. Sup. Ct.* (1964) 60 Cal.2d 711, 714. In effect, should the discovery
28 be allowed to go forward while the writ was pending, it would make any possible reversal of the order

1 meaningless since the damage sought to be prevented by the writ, namely the violation of the sanctity of
2 the attorney-client privilege, would have already occurred. The prudent course would be to stay
3 discovery pending a ruling on the motion to withdraw as counsel and determination of COUNSEL's writ
4 challenging the Court Order waiving the attorney-client privilege based on the crime/fraud exception.
5 To allow the discovery to go forward would potentially create irrevocable damage to SIX4THREE.

6
7 **III. CONCLUSION**

8 For the foregoing reasons, COUNSEL respectfully requests that the Court GRANT this ex parte
9 application.

10 DATED: March 27, 2019

MURPHY, PEARSON, BRADLEY & FEENEY

11
12
13 By 

14 James A. Murphy
15 Joseph S. Leveroni
16 Attorneys for BIRNBAUM & GODKIN, LLP

17 DATED: March 27, 2019

18 WILSON ELSER

19 By 

20 Joseph S. Leveroni signing for
21 Donald P. Sullivan
22 Attorneys for GROSS & KLEIN, LLP

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CERTIFICATE OF SERVICE

I, Jennifer Cuellar, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108.

On March 27, 2019, I served the following document(s) on the parties in the within action:

EX PARTE APPLICATION TO STAY DISCOVERY

**DECLARATION OF JOSEPH S. LEVERONI IN SUPPORT OF EX PARTE APPLICATION
TO STAY DISCOVERY**

**[PROPOSED] ORDER ON BIRNBAUM & GODKIN, LLP AND GROSS & KLEIN, LLP'S EX
PARTE APPLICATION TO STAY DISCOVERY**

X

VIA HAND: The above-described document(s) will be placed in a sealed envelope which will be hand-delivered on this same date by _____, addressed as listed below.

Superior Court of California County of San Mateo
Department 23
400 County Center
Redwood City, CA 94063

X

VIA E-MAIL: I attached the above-described document(s) to an e-mail message, and invoked the send command at approximately _____ AM/PM to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is jcuellar@mpbf.com

Computer Law Group, LLP
401 Florence Street
Palo Alto, CA 94301
Email: jrusso@computerlaw.com
csargent@computerlaw.com

Attorneys for Theodore Kramer and Thomas
Scaramellino

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Attorneys for Facebook, Inc.

14 I declare under penalty of perjury under the laws of the State of California that the foregoing is
15 a true and correct statement and that this Certificate was executed on March 27, 2019.

16 By 
17 Jennifer Cuellar

EXHIBIT 5

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4 Of counsel:

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10 Attorneys for Plaintiff,
SIX4THREE, LLC, a Delaware
11 limited liability company

12
13 SUPERIOR COURT OF CALIFORNIA

14 COUNTY OF SAN MATEO

15 SIX4THREE, LLC, a Delaware limited
liability company;

16 Plaintiff,

17 v.:

18 FACEBOOK, INC., a Delaware
19 corporation;
20 MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
21 JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
22 MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1 through 50, inclusive,

23 Defendants.
24
25
26
27
28

Case No. CIV 533328

Assigned For All Purposes To
Hon. V. Raymond Swope, Department 23

**PLAINTIFF'S EX PARTE
APPLICATION FOR ORDER
CONTINUING HEARING DATE**

Department: 23
Judge: Honorable V. Raymond Swope
Filing Date: April 10, 2015
Trial Date: April 25, 2019

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE that pursuant to the Court's Order on this date, Plaintiff Six4Three,
3 LLC, by current counsel of record Birnbaum & Godkin, LLP and Gross & Klein LLP, will and hereby
4 does file this *ex parte* application and requests that the Court issue an order continuing the February 7,
5 2019 hearing in this matter on Defendant Facebook, Inc.'s motion to re-open discovery and to compel,
6 the Individual Defendants' motion for attorneys' fees, and Six4Three's motion for attorneys' fees, until
7 after the hearing and decision on Plaintiff's counsel's motions to be relieved as counsel in this matter,
8 currently set for February 7, 2019, and that the attorneys' fees motions, Facebook's motion, and any
9 other motion filed in this matter be set for hearing on or after April 30, 2019.

10 Six4Three submits that all such motions, with the exception of Birnbaum & Godkin, LLP's and
11 Gross & Klein LLP's motions to be relieved as counsel, should be continued to April 30, 2019 or later in
12 order to provide Plaintiff Six4Three, LLC sufficient time to retain new counsel and to provide sufficient
13 time for new counsel to review the case file and become fully prepared to represent Plaintiff in this matter.

14 Notice of this application will be provided to all counsel of record, as well as individual counsel
15 for Mr. Kramer and Mr. Scaramellino, and individual counsel for Gross & Klein LLP. Additionally,
16 Counsel for Birnbaum & Godkin, LLP sent email notice of this *ex parte* application to all parties on
17 Tuesday, January 15, 2019.

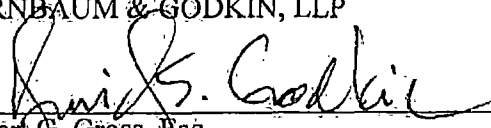
18 This application is based upon the following memorandum of points and authorities, the
19 Declaration of David S. Godkin, and such additional evidence and argument as may be presented at or
20 before any hearing on this matter.

21 Dated: January 17, 2019

Respectfully Submitted,

22
23 GROSS & KLEIN LLP

24 BIRNBAUM & GODKIN, LLP

25 By: 
26 Stuart G. Gross, Esq.
27 David S. Godkin (admitted *pro hac vice*)
28 James E. Kruzer (admitted *pro hac vice*)
Attorneys for Plaintiff Six4Three, LLC

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO**
3 **CONTINUE HEARING DATE**

4 By now, the Court and the parties are aware that a conflict of interest has arisen between counsel
5 of record and Plaintiff, Six4Three, LLC. The un-waivable conflict, in addition to the breakdown in the
6 attorney-client relationship that it has caused, prevents counsel of record from effectively executing their
7 duties as counsel for Plaintiff in this matter. Under these circumstances, such as they are, Birnbaum &
8 Godkin, LLP and Gross & Klein LLP are required to withdraw as counsel. On January 7, 2019, Birnbaum
9 & Godkin and Gross & Klein LLP filed and served the required motions to be relieved as counsel pursuant
10 to Code of Civil Procedure, section 2019.020, with the hearing on the motions set for February 7, 2019.
11 However, there are several other motions set for the same date, including Defendant's motion to open
12 discovery and to compel, the Individual Defendants' motion for attorney's fees, and Six4Three's motion
13 for attorneys' fees, which, along with the corresponding briefing schedule for those hearings, creates the
14 issue of requiring Plaintiff to engage in further litigation without the benefit of unconflicted counsel due
15 to the previously and properly noticed conflict for Six4Three's current counsel of record. This is the issue
16 Six4Three seeks to remedy through this ex parte application requesting the court to continue such hearings
17 until the motion to be relieved as counsel is decided, as such an order would prevent the recurring issue of
18 forcing Plaintiff to litigate hearings and file opposing papers without the assistance of unconflicted counsel
19 due to the existing conflict.

20 Regarding the nature of the conflict as grounds for this ex parte application, as the Court has
21 previously been informed, an un-waivable conflict has arisen between counsel of record (Birnbaum &
22 Godkin, LLP and Gross & Klein LLP) and Six4Three, requiring mandatory withdrawal of counsel.
23 Good cause exists pursuant to one or more of the grounds set out in Cal. Rules of Prof. Conduct, R.
24 3-700(B) and (C), and Six4Three has not consented to relieve counsel after receiving counsel's
25 request, although it is actually seeking replacement counsel. Facebook's allegations directed at both
26 Six4Three and counsel of record, in addition to Facebook's attempts to direct discovery requests to
27 counsel of record, separate and apart from Six4Three, make a prima facie showing of an un-waivable
28 conflict between attorney and client. Furthermore, a breakdown in communication between Six4Three

1 and counsel of record has rendered it impossible to provide effective representation. As a result,
2 counsel of record is unable to represent Six4Three in connection with the matters set for hearing on
3 February 7, 2019.

4 Counsel of record understands from individual counsel for Messrs. Kramer and Scaramellino
5 that Six4Three is seeking to engage new counsel to represent it in this matter. Accordingly, Six4Three
6 seeks a continuance of the discovery motions and motions for attorneys' fees currently set for February
7 7, 2019 to a future date after the hearing and decision on Birnbaum & Godkin, LLP's and Gross &
8 Klein LLP's motions to be relieved as counsel. Six4Three submits that the court continue such
9 hearings until April 30, 2019 or later to permit Six4Three additional time to engage replacement
10 counsel and for replacement counsel to get "up to speed" and be in a position to substitute in as counsel
11 for Six4Three.

12 Finally, to the extent that additional motions are filed (other than counsel of record's motion to
13 be relieved as counsel set for February 7, 2019), any hearings on those additional motions should be
14 set for April 30, 2019 or later so that they can be handled by Six4Three's new counsel.

15 Of course, in the event that Birnbaum & Godkin, LLC is relieved, counsel will continue to be
16 bound by all protective orders and court orders issued in this matter pursuant to Rule 3-700(D)(1).

17 Accordingly, Six4Three respectfully requests that the Court continue the discovery motions and
18 motions for attorneys' fees set for February 7, 2019 hearings, and other future hearings (other than
19 Birnbaum & Godkin, LLP's and Gross & Klein's motions to be relieved as counsel set for February 7,
20 2019) to April 30, 2019 or later. A proposed Order is submitted herewith in .pdf and Word format.

21 Dated: January 17, 2019

Respectfully Submitted,

GROSS & KLEIN LLP

BIRNBAUM & GODKIN, LLP

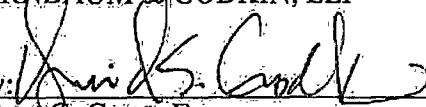
24
25 By: 
Stuart G. Gross, Esq.
David S. Godkin (admitted *pro hac vice*)
James E. Krüzer (admitted *pro hac vice*)
Attorneys for Plaintiff Six4Three, LLC

EXHIBIT 6

May 2, 2019

VIA E-MAIL

The Honorable V. Raymond Swope
Superior Court of California, County of San Mateo
Department 23, Courtroom 8A
400 County Center
Redwood City, CA 94063

Re: *Six4Three, LLC v. Facebook, Inc.*
Case No. CIV 533328

Your Honor:

Facebook submits this letter brief in advance of the May 3, 2019 discovery conference.

On March 15, the Court held that the crime-fraud exception to privilege applied; reopened discovery; and directed Facebook to serve document requests that were reviewed by the Court. *See* Order Re: Def. Facebook Inc.'s Mot. to Open Disc. and to Compel at 13 (Mar. 15, 2019) ("March 15 Order"). Despite that Order, we are no closer to getting to the bottom of the breaches of the Protective Order, the Court's November 1, 2018 sealing order, and the Court's November 20, 2018 order prohibiting disclosure of documents, or to the improper dissemination of Facebook's confidential and highly confidential information than we were before. Not a single document or shred of information has been produced since March 15. Instead, (1) Mr. Godkin refused to produce allegedly privileged documents; (2) Mr. Gross refused to produce any documents; (3) Mr. Scaramellino has ducked service of Facebook's subpoena; (4) Mr. Dehay continued to avoid complying with Amended Case Management Order No. 19; and (5) Mr. Kramer and Mr. Scaramellino have objected to Facebook's proposed forensic examination protocol.

Facebook respectfully requests that the Court break the log jam at the May 3 discovery conference. All of the relevant individuals are represented, and Mr. Godkin, Mr. Gross, Mr. Kramer, Mr. Scaramellino, and Mr. Dehay should not be permitted to continue ignoring the Court's orders.

I. The Court Should Overrule Mr. Godkin's Objections to Facebook's Subpoena.

Facebook served Mr. Godkin with document and deposition subpoenas that included the document requests identified in Appendix A to the March 15 Order. Mr. Godkin refuses to produce any allegedly privileged documents and objects that Facebook's deposition subpoena is premature.

The Court should reject Mr. Godkin's objections to the document subpoena. During a meet and confer, Mr. Godkin's only bases for the assertion of privilege were that (1) someone might seek writ review of the March 15 Order, and (2) Mr. Kramer instructed Mr. Godkin not to produce any allegedly privileged documents. Both arguments amount to a disregard for the March 15 Order, which held that privilege was waived pursuant to the crime-fraud exception. The Court should reject these objections pursuant to its authority to enforce its orders. *See* Civ. Proc. Code § 128(a). The fact that someone may at some point file a writ of the March 15 Order provides no basis to refuse to produce documents now.

The Court should also reject Mr. Godkin's objection to the deposition subpoena. Mr. Godkin claims that the subpoena is premature, but this misstates the record. The Court found that "Facebook has demonstrated the necessity of deposing Six4Three's counsel and members of its legal team[.]" March 15 Order at 10:13–14. Facebook served a deposition subpoena and informed Mr. Godkin that Facebook was willing to discuss a mutually agreeable date. Mr. Scaramellino raised a similar objection to Facebook's attempt to serve a deposition subpoena, and the Court rejected this objection. *See* Case Mgmt. Order No. 21 at 1:27–28 (Apr. 2, 2019) ("Mr. Scaramellino's assertion that the subpoenas served on, *inter alios*, Mr. Scaramellino conflicts with the Court's order is incorrect."). The Court should overrule this objection and permit the deposition to proceed after document production.

II. The Court Should Overrule Stuart Gross's Meritless Objections to Facebook's Subpoena.

Facebook served Mr. Gross with document and deposition subpoenas that included the document requests identified in the March 15 Order. Mr. Gross refuses to produce any allegedly privileged documents, and raises general and specific objections to Facebook's document requests.

A. The Court Should Overrule Mr. Gross's Privilege and General Objections

Mr. Gross refuses to comply with the Court's March 15 Order and will not produce any responsive documents until the Court of Appeal weighs in. During a meet and confer, Mr. Gross's counsel stated, "[W]e actually need an order from the Court of Appeals before any kind of documents are produced. . . . I don't think the order from Judge Swope[] is correct." Remarkably, Mr. Gross stands on this objection despite the fact that no one has sought writ review of the March 15 Order. His recalcitrance could be several things—an act of contempt, *see, e.g.*, Civ. Proc. Code §§ 1209(a)(10), 2020.240; a sanctionable abuse of the discovery process, *see* Civ. Proc. Code § 2023.010(e); or a dereliction of an attorney's duty to "maintain the respect due to the courts of justice and judicial officers," *see* Cal. Bus. & Prof. Code § 6068(b). But it is not a valid discovery objection.

Mr. Gross also raises general objections based on a "conflict of interest," form, and notice. But no conflict of interest prevents him from responding to the subpoena. During the meet and confer, Facebook confirmed that the "conflict of interest" objection did not relate to Mr. Gross's motion to withdraw as counsel. Instead, the objection arises from Six4Three's instruction that Mr. Gross produce nothing in response to the subpoena. Mr. Gross's counsel refused to explain the basis for the instruction, or who communicated it. A client's request, without more, does not excuse a law firm from production

obligations. *See* Cal. Bus. & Prof. Code § 6068(a).

Mr. Gross's objections as to form also lack merit. He complains that the subpoena for records and testimony specified different dates for document production and deposition. But Facebook complied with every requirement for such subpoenas: Facebook gave Mr. Gross "a reasonable opportunity to locate and produce any designated business records, documents, electronically stored information, and tangible things"—*i.e.*, almost two weeks. Civ. Proc. Code § 2020.220(a). Facebook provided "a reasonable time to travel to the place of deposition." *Id.* Finally, Facebook's subpoena complied with section 2020.510. Mr. Gross has not named a provision that Facebook missed.

As for notice, Mr. Gross's objection is facially baseless. He argues that under Civil Procedure Code section 1985.3, which requires notice when a subpoena seeks information "pertaining to a consumer," Facebook had to give notice to Six4Three, LLC. Section 1985.3(a)(2) defines "consumer" as "any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary." Civ. Proc. Code § 1985.3(a)(2). A limited liability company is none of those things. In particular, interpreting "association" to include every corporate entity would render other statutory text—most obviously, "partnership *of five or fewer persons*"—surplusage. Civ. Proc. Code § 1985.3 (emphasis added). Moreover, reading that section to include Six4Three would produce absurd results: The section's purpose "is to give the consumer notice and an opportunity to object to disclosure of private information." *Conservatorship of S.A.*, 25 Cal. App. 5th 438, 444 (2018), *review denied* (Oct. 10, 2018). Six4Three had notice and opportunity: Facebook served virtually identical requests on Six4Three in March, and Six4Three instructed Mr. Gross and Mr. Godkin not to comply with Facebook's subpoenas. Mr. Gross's threshold consumer notice objection cannot stand.

B. The Court Should Overrule Mr. Gross's Specific Objections

Mr. Gross's specific objections to Facebook's document requests also lack merit.

First, Mr. Gross's privilege objections disregard this Court's March 15 Order. Mr. Gross objects to each request on the basis of the "attorney client privilege, the work product doctrine, and any other applicable privilege" But this Court ruled that the attorney-client privilege was waived pursuant to the crime-fraud exception. *See* March 15, 2019 Order at 13:16–17. And Facebook served only the requests authorized by the Court, which on their face, reasonably relate to Six4Three's illegal disclosure of Facebook's confidential and highly confidential information. *See* March 15 Order at 13:12–15. Nevertheless, Mr. Gross's lawyer stated that Mr. Gross intends to withhold communications as privileged at least "until the Court of Appeals weighs in." Facebook asked, "[Y]ou don't think the order from Judge Swope[] is sufficient?" Mr. Gross's lawyer: "No. . . . [T]he Court of Appeals is going to have to either reverse him or send back [] instructions on how to tailor the actual scope of the waiver provision[.]" Incredibly, Mr. Gross has taken these positions *without even filing a writ*. To the extent Mr. Gross stands on his privilege objection based on California's work product protection, his work product log is now long overdue. *See* March 15 Order at 13:16–17 ("A work product log shall be served

for any documents withheld on those grounds.”).

Second, Mr. Gross objects that every request is overbroad and burdensome.¹ But Mr. Gross fails to grapple with the fact that the Court granted leave to serve these exact requests. *See* March 15 Order at 13:12–15. He also fails to make the showing required for a burden objection. An “objection based upon burden must be sustained by evidence showing the quantum of work required[.]” *West Pico Furniture Co. of Los Angeles v. Superior Court*, 56 Cal. 2d 407, 417 (1961). Neither Mr. Gross’s written objections, nor counsel’s explanations while conferring, show the “quantum of work required” to respond to Facebook’s document requests. Mr. Gross’s lawyer argued only that Mr. Gross “has a business to run” and “clients to serve,” such that participating in the Court’s investigation into these issues is “an extreme burden.” These generalized allegations of burden are insufficient: “some burden is inherent in all demands for discovery,” and so “[t]he objection of burden is valid only when that burden is demonstrated to result in injustice.” *West Pico*, 56 Cal. 2d at 418.

Third, Mr. Gross objects that Facebook’s subpoena may call for confidential information, but concedes that he may rely on the Stipulated Protective Order to protect such information from disclosure. *See* Stip. Protective Order ¶ 1 (Oct. 25, 2016) (“A party or non-party may designate as Confidential. . . any document or response to discovery which . . . contain[s] . . . confidential . . . information[.]”) During meet and confer, Mr. Gross’s counsel confirmed that the protective order’s provisions should be sufficient “just so long as information like that isn’t in the public record.”

Fourth, Mr. Gross’s boilerplate vagueness objections must be overruled.² California courts sustain vagueness objections only where a discovery request precludes “intelligent reply.” *Cembrook v. Superior Court*, 56 Cal. 2d 423, 430 (1961). Facebook’s requests are not so vague—indeed, Facebook’s subpoena defined the only term about which Gross’s lawyer complained during the meet and confer: “documents.”

III. Thomas Scaramellino Continues to Evade Service of Facebook’s Subpoenas.

¹ Mr. Gross raises his burden objection under various labels that add no different substance. For example, he objects to requests 1, 2, 3, 5, and 6 “to the extent [they] require[] answers greater than, beyond the requirements of, and/or at variance to applicable California law.” Mr. Gross’s lawyer conceded that this objection encompassed only Mr. Gross’s objections as to burden and as to the subpoena’s compliance deadline. As to each of these objections, Facebook’s responses to Mr. Gross’s burden objections are equally applicable.

² Mr. Gross raises his vagueness objection under various labels. For example, he objects to Requests 1, 2, 3, 5, and 6 on the grounds that, “it may not be possible to identify responsive documents based on the wording of the request.” Mr. Gross’s lawyer conceded that this objection made no argument beyond the vagueness objection.

Six4Three's sole investor, Thomas Scaramellino, played a central role in the disclosure of Facebook's confidential and highly confidential information. On March 18, Facebook contacted counsel for Mr. Scaramellino and asked that he either accept service of a subpoena to Mr. Scaramellino or provide Mr. Scaramellino's address. Mr. Russo refused to discharge that most basic of a lawyer's tasks: accepting service on behalf of one's client. *See, e.g., California Attorney Guidelines of Civility & Professionalism, Section 4(h)* ("An attorney should agree to reasonable requests in the interests of efficiency and economy, including agreeing to a waiver of procedural formalities where appropriate."), *available at* http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf; *Santa Clara County Bar Ass'n Code of Professionalism at § 9* ("A lawyer should conduct discovery in a manner designed to ensure the timely, efficient, cost-effective, and just resolution of a dispute."), *available at* <https://sccbba.site-ym.com/page/professionalism#9>. Instead, Mr. Russo failed to respond for days, and then belatedly provided an address for a summer vacation complex in Forestburgh, New York. Relying on Mr. Russo's representations, Facebook spent thousands of dollars attempting to serve Mr. Scaramellino at that address, but unsurprisingly, attempts to serve Mr. Scaramellino there failed.

After the Court suggested that Facebook serve Mr. Scaramellino "at his place of employment that Mr. Scaramellino previously provided in court filings," Case Mgmt. Order No. 21 at 1 (Apr. 2, 2019), Facebook was unable to confirm a current work address (Mr. Scaramellino has represented to the Court that he is a Director of TallyGo, a company whose last known business address is in Los Angeles, while also claiming to reside in New York) and asked Mr. Scaramellino's counsel to do so. Russo accused Facebook of harassment and refused to accept service or provide a service address. Left with no other option, Facebook then unsuccessfully tried to serve Mr. Scaramellino at TallyGo's last known business address in Los Angeles. This address is an apartment, and the current tenant stated that she had been living there since November 2018, did not know of TallyGo or Mr. Scaramellino, and that there was no business located at that address.

In all, Facebook attempted to serve Mr. Scaramellino multiple times over the course of four weeks at four addresses in two states (in Manhattan, in Los Angeles, and at two addresses in Sullivan County, New York, which Mr. Scaramellino revealed for the first time as his "home county" in his declaration of April 12, 2019) using four different process servers.

The Court should put a stop to the evasion. Mr. Russo should show cause why he will not accept service or provide a correct address. *See In re Holmes*, 145 Cal. App. 3d 934, 944 (1983) (finding a lawyer in contempt for "knowingly and intentionally aiding another person to evade service of a subpoena by obstructing the service of the subpoena"). Or, if he continues to refuse, Facebook requests that the Court (1) order Mr. Scaramellino to provide a correct address for service of Facebook's subpoena; or (2) order Mr. Scaramellino to appear, testify, and submit to cross-examination. At this point, Mr. Scaramellino—who is an investor and advisor to a party in this litigation, was litigating this case as a member of the legal team, and who expressly subjected himself to this Court's jurisdiction when he subscribed to the protective order—is willfully evading this Court's investigation into the crime or fraud. And Mr. Russo is helping him do so. Facebook thus renews its request that the Court order

Mr. Russo to accept service or Mr. Scaramellino to provide an address for service of a subpoena.

In the alternative, Facebook asks that the Court order Mr. Scaramellino to appear, testify, and submit to cross-examination about the disclosure of Facebook's confidential and highly confidential information. The Court has the power to compel appearance and testimony. *See* Civ. Proc. Code §§ 128, 187 & 2031.060; *Cates v. Cal. Gambling Control Comm'n*, 154 Cal. App. 4th 1302, 1314 (2007); *Koehler v. Superior Court*, 181 Cal. App. 4th 1153, 1157 (2010). Section 128(a)(6) of the Code of Civil Procedure provides the Court authority "[t]o compel the attendance of persons to testify in an action or proceeding pending therein[.]" Civ. Proc. Code § 128(a)(6); *see also Silvagni v. Superior Court*, 157 Cal. App. 2d 287, 292 (1958) (discussing "the unquestioned power of the court to compel [a civil litigant] as a witness."). That power is protected by the provisions of the Code of Civil Procedure that let the Court issue bench warrants for failure to appear. *See, e.g.,* Civ. Proc. Code § 1993(a)(1) ("[T]he court may issue a warrant for the arrest of . . . a person who failed to appear pursuant to a court order."). The Court would be well within its discretion to compel Mr. Scaramellino to appear and testify about the disclosure of Facebook's confidential and highly confidential information.

IV. The Court Should Order the Appearance and Testimony of Paul-Olivier Dehaye.

Since January, the parties and the Court have known that Six4Three contemplated a scheme whereby a retained "expert" would serve as an anonymous source for media reporting on Six4Three's allegations. In early March, after Facebook's documents continued to leak, the Court ordered Six4Three to produce a declaration from its experts swearing that they never disclosed or discussed Facebook's confidential or highly confidential information in violation of the protective order. *See* Case Mgmt. Order No. 19 ¶¶ 3-4 (Mar. 1, 2019). Paul-Olivier Dehaye, the purported "expert" who Six4Three and its legal team floated to journalists as an anonymous source, did not comply.

Instead, Dehaye demanded that Facebook drop its request that he attest to his compliance with the protective order. He refused to say if he had disclosed or discussed Facebook's confidential and highly confidential information with journalists. He conceded that he "did not . . . give a detailed analysis to the terms of the Protective Order" and now "realize[s] that the terms of the Protective Order are complex and require detailed analysis." Dehaye Decl. ¶ 8(c) (Mar. 22, 2019). Far from swearing to his compliance, Dehaye equivocated: "In order for me to fully explain what I have or have not done, I will need further legal advice and a deep consideration of all documents and communications." *Id.* However, he produced a protective order certification proving that he "consent[ed] to the jurisdiction of the San Mateo Superior Court for the purpose of enforcing the Order[.]" *Id.* at .pdf 39.

Facebook requested Dehaye's documents within days of the March 15 Order opening discovery. Specifically, Facebook served Six4Three with requests for documents regarding disclosures of Facebook's information. Facebook made clear that those requests reached communications by "ANY other agent or representative of SIX4THREE, including but not limited to any retained expert or consultant." Given Six4Three's lack of cooperation and the Court's order relieving Six4Three's counsel from representing the entity, Facebook has been unable to obtain any documents that would shed light

on what Mr. Dehayé did with Facebook's confidential and highly confidential information in hand. Moreover, even if Facebook were ultimately to get Dehayé's documents, they would not provide a complete picture of his (mis)conduct. The limited documents we have confirm that Six4Three's legal team contemplated phone calls involving Dehayé. Accordingly, investigation into Six4Three's violations of this Court's orders requires that the Court compel Dehayé's appearance and testimony. *See* p. 6, *supra* (describing Court's authority to compel witness attendance and testimony).

V. The Court Should Approve the Forensic Examination Protocol Proposed by Facebook.

Pursuant to the March 15 Order, Facebook submitted its proposed parameters for searches for electronic documents collected and transferred to the neutral third-party forensic examiner in Exhibit A to its April 19, 2019 letter brief. Facebook's proposal calls for an expedited, comprehensive analysis of each preserved storage device or account. The protocol sets forth relevant search terms, which includes the e-mail domains of journalists and regulators with whom Six4Three and its legal team communicated.

Counsel for Mr. Kramer and Mr. Scaramellino objected to Facebook's proposed protocol, but the objections lack merit. *First*, Facebook's proposed protocol is not "unacceptably broad." Facebook derived the proposed search terms from Birnbaum & Godkin and Gross & Klein's preliminary document productions, which show the third parties with whom Six4Three or its legal team communicated. The terms are unquestionably relevant to the investigation of Mr. Scaramellino and Mr. Kramer's violations. *Second*, the proposed protocol sets a date restriction on searches. The search shall include all documents created, modified, or accessed between March 1, 2018 through the present—the same date range that Birnbaum & Godkin and Gross & Klein's preliminary document productions show to be relevant. *Finally*, Mr. Kramer and Mr. Scaramellino's privilege objections lack merit. Facebook crafted a search protocol, the results of which will not require privilege review by Mr. Kramer and Mr. Scaramellino's personal counsel. Many of the results of the search terms are expected to be communications with third parties that could never be privileged to begin with. And more fundamentally, each proposed search term reasonably relates to the crime or fraud perpetrated by Six4Three and its legal team. The privilege objections appear to be little more than an attempt at further delay.³ Mr. Kramer and Mr. Scaramellino offered no counterproposal, and instead simply objected. The Court should approve Facebook's proposed protocol so that the limited discovery opened by the March 15 Order may proceed.

Respectfully submitted,



Sonal N. Mehta

³ The proposed date restriction further reduces the risk that attorney-client communications related to other legal matters will return from the proposed search.

EXHIBIT 7

1 IN THE SUPERIOR COURTS OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

3 ---000---

4
5 SIX4THREE, LLC, A DELAWARE
6 LIMITED LIABILITY COMPANY,

CERTIFIED TRANSCRIPT

7 PLAINTIFFS,

8 VS.

CASE NO. CIV533328

9 FACEBOOK, INC., A DELAWARE
CORPORATION, ET AL.,

10 DEFENDANTS.

11 _____/

12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 BEFORE: HONORABLE V. RAYMOND SWOPE, JUDGE

14 DEPARTMENT 23

15 NOVEMBER 30, 2018

16
17
18 A P P E A R A N C E S

19 FOR THE PLAINTIFFS: STUART G. GROSS
20 ATTORNEY AT LAW

21 DAVID S. GODKIN
ATTORNEY AT LAW

22 FOR THE DEFENDANTS: JOSH H. LERNER
23 ATTORNEY AT LAW

24 SONAL N. MEHTA
ATTORNEY AT LAW

25
26 REPORTED BY: GERALDINE VANDEVELD, C.S.R. 8634

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA

NOVEMBER 30, 2018

--OOO--

THE COURT: GOOD AFTERNOON, EVERYONE. CALLING CASE
NUMBER CIV533328. THE MATTER OF SIX4THREE, LLC VERSUS
FACEBOOK, ET AL. WILL COUNSEL, PLEASE, STATE YOUR APPEARANCES
FOR THE RECORD.

MR. GODKIN: GOOD AFTERNOON, YOUR HONOR.
DAVID GODKIN, BIRNBAUM & GODKIN FOR THE PLAINTIFF SIX4THREE.

MR. GROSS: GOOD AFTERNOON, YOUR HONOR.
STUART GROSS, GROSS & KLEIN FOR PLAINTIFF SIX4THREE.

MR. GODKIN: AND MR. KRUZER FROM MY OFFICE IS HERE,
YOUR HONOR, AS WELL.

MR. THOREEN: GOOD AFTERNOON, YOUR HONOR.
PETER THOREEN FROM ALTSHULER & BERZON ON BEHALF OF
THEODORE KRAMER.

MS. MEHTA: GOOD AFTERNOON, YOUR HONOR. SONAL MEHTA
FROM DURIE TANGRI ON BEHALF OF FACEBOOK. WITH ME JOSH LERNER,
LAURA MILLER, CATHERINE KIM AND ZACHARY ABRAHAMSON. ALL FROM
THE LAW FIRM OF DURIE TANGRI. AS WELL AS PAUL GREWAL, VICE
PRESIDENT DEPUTY GENERAL COUNSEL FOR LITIGATION FROM FACEBOOK.

MR. GREWAL: GOOD AFTERNOON, YOUR HONOR.

MS. MEHTA: AND NATALIE NAUGLE ASSOCIATE GENERAL

1 COUNSEL FOR LITIGATION AT FACEBOOK.

2 MS. NAUGLE: GOOD AFTERNOON, YOUR HONOR.

3 THE COURT: GOOD AFTERNOON. THIS HEARING WAS
4 SCHEDULED BY THIS COURT ON TODAY'S DATE PURSUANT TO AN
5 EX PARTE APPLICATION BY DEFENDANT FACEBOOK, INC. FOR EXPEDITED
6 RELIEF REGARDING SIX4THREE'S DISOBEDIENCE OF A VALID COURT
7 ORDER. FACEBOOK HAS FILED AN EX PARTE APPLICATION SEEKING AN
8 ORDER TO SHOW CAUSE AS TO WHY TERMINATING SANCTIONS AND
9 MONITORING SANCTIONS SHOULD NOT ISSUE AGAINST SIX4THREE, LLC
10 AND ITS COUNSEL.

11 GENERALLY EX PARTE PROCEEDINGS ARE NOT REPORTED.
12 HOWEVER, BECAUSE OF THE GRAVITY OF THE CONDUCT BY THE
13 PLAINTIFF'S PRINCIPAL MR. KRAMER, THIS COURT BELIEVES IT IS
14 ESSENTIAL THAT THESE PROCEEDINGS ARE REPORTED BY A COURT
15 REPORTER AND PRESERVED ON THE RECORD.

16 ON OCTOBER 25TH, 2016, THIS COURT ISSUED A
17 PROTECTIVE ORDER PURSUANT TO A STIPULATION OF THE PARTIES.
18 THIS ORDER WAS BINDING ON ALL PARTIES INCLUDING MR. THEODORE
19 KRAMER. ON NOVEMBER 1ST, 2018, THIS COURT GRANTED A MOTION TO
20 SEAL CERTAIN CONFIDENTIAL DOCUMENTS AND ORDERED STRICKEN
21 CERTAIN EVIDENCE PROFFERED BY THE PLAINTIFF SIX4THREE.

22 LATER, ON NOVEMBER 19TH, 2018, THIS COURT RECEIVED
23 AN EMAIL FROM DEFENDANT FACEBOOK THAT THE HOUSE OF COMMONS
24 DIGITAL CULTURE MEDIA AND SPORT COMMITTEE OTHERWISE KNOWN AS
25 DCMS IN THE UNITED KINGDOM HAD ORDERED MR. KRAMER TO SUBMIT
26 UNREDACTED COPIES OF SIX4THREE'S OPPOSITION TO THE ANTI-SLAPP

1 MOTION. THIS OF COURSE WAS CONTRARY TO MY SEALING ORDER OF
2 NOVEMBER 1ST.

3 ACCORDINGLY, I ISSUED A FURTHER ORDER ON
4 NOVEMBER 20TH, 2018. AND THAT ORDER STATED THE FOLLOWING,
5 QUOTE "NO UNREDACTED COPIES OF PLAINTIFF'S OPPOSITION TO
6 EITHER FACEBOOK'S SPECIAL MOTION TO STRIKE OR INDIVIDUAL
7 DEFENDANT'S SPECIAL MOTION TO STRIKE SHALL BE TRANSMITTED,
8 RELEASED OR SUBMITTED UNTIL FURTHER ORDER OF THE COURT.

9 FAILURE TO COMPLY WILL BE CONSIDERED AN ACT OF
10 CONTEMPT. NOTWITHSTANDING THESE THREE VALID ORDERS THAT WERE
11 ISSUED BY THIS COURT, I'VE BEEN INFORMED THAT MR. THEODORE
12 KRAMER HAS SUBMITTED THESE DOCUMENTS TO THE DCMS COMMITTEE OF
13 THE HOUSE OF COMMONS.

14 NOW, THIS COURT SET A BRIEFING SCHEDULE ON THE
15 DEFENDANT FACEBOOK'S EX PARTE APPLICATION. AND THIS COURT HAS
16 READ AND CONSIDERED THE PAPERS AND THE DECLARATIONS FILED
17 THEREWITH.

18 GIVEN THAT THE DEFENDANT IS THE MOVING PARTY,
19 COUNSEL FOR THE DEFENDANT WILL BE PERMITTED TO PRESENT ITS
20 ARGUMENT FIRST FOLLOWED BY THE PLAINTIFF'S ARGUMENT. BUT
21 BEFORE WE BEGIN WITH THE ARGUMENTS BY COUNSEL, I HAVE A
22 QUESTION FOR MR. KRAMER. SO AT THIS TIME -- AND IT'S ONLY TWO
23 QUESTIONS. I ASK THAT THE -- MR. KRAMER STAND AND BE SWORN IN
24 BY THE COURTROOM CLERK.

25 THE CLERK: PLEASE STAND AND RAISE YOUR RIGHT HAND.

26 (WHEREUPON, THEODORE KRAMER WAS FIRST DULY SWORN.)

1 THE CLERK: THANK YOU. HAVE A SEAT.

2 THE COURT: FIRST, MR. KRAMER, IS EVERYTHING SET
3 FORTH IN THE DECLARATION THAT YOU FILED ON NOVEMBER 26, 2018,
4 AND ALL OF THE ATTACHMENTS THERETO TRUE AND CORRECT UNDER
5 PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA?

6 MR. KRAMER: YES, YOUR HONOR.

7 THE COURT: MY SECOND QUESTION. IS THE SUBJECT
8 LAPTOP THAT IS TO SAY YOUR LAPTOP THAT YOU USED TO TRANSFER
9 THE FILES TO THE USB THUMB-DRIVE IN WORKING ORDER?

10 MR. KRAMER: YES, YOUR HONOR.

11 THE COURT: IS YOUR LAPTOP FULLY FUNCTIONAL?

12 MR. KRAMER: YES, YOUR HONOR.

13 THE COURT: DO YOU HAVE IT WITH YOU TODAY?

14 MR. KRAMER: I DO NOT, YOUR HONOR.

15 THE COURT: OKAY. WELL, AFTER I HEAR THE ARGUMENTS,
16 I'M GOING TO MAKE AN ORDER. AND YOU ARE TO HAVE YOUR LAPTOP
17 PRESENTED TO MR. GROSS NO LATER THAN 8:00 P.M. TONIGHT. DO
18 YOU UNDERSTAND THAT, SIR?

19 MR. KRAMER: YES, SIR.

20 THE COURT: THAT WILL BE AN ORDER OF THE COURT.
21 THAT'S ALL I HAVE TO SAY BEFORE THE ARGUMENTS BEGIN EXCEPT
22 THAT WHEN I ISSUE A VALID COURT ORDER GOVERNING THE CONDUCT OF
23 THE PARTIES IN THIS CASE OR ANY OTHER SUCH COURT ORDER, I
24 EXPECT THESE ORDERS TO BE FOLLOWED. I DO NOT EXPECT A
25 COMPROMISE OF THE INTEGRITY OF THIS JUDICIAL SYSTEM WHICH HAS
26 BEEN DONE.

1 NOW, COUNSEL FOR THE DEFENDANT, ARE YOU READY TO
2 PROCEED WITH YOUR ARGUMENTS?

3 MS. MEHTA: YES, YOUR HONOR. THANK YOU. AT THIS
4 POINT THERE IS NO DISPUTE THAT SIX4THREE, MR. KRAMER AND
5 COUNSEL VIOLATED MULTIPLE ORDERS OF THE COURT AND THAT
6 EVIDENCE HAS BEEN DESTROYED. FACEBOOK'S HIGHEST PRIORITY AT
7 THIS POINT IS TO DETERMINE THE EXTENT OF THE VIOLATION OF THE
8 COURT'S ORDERS AND THE DISSEMINATION OF CONFIDENTIAL
9 INFORMATION, VIOLATION OF THE COURT'S ORDERS AND TO GET TO THE
10 BOTTOM OF WHAT REALLY HAPPENED HERE SO THAT THE COURT CAN
11 ISSUE APPROPRIATE REMEDIAL MEASURES AND APPROPRIATE SANCTIONS.

12 WHAT WE KNOW SO FAR, YOUR HONOR, IS BASED ONLY ON
13 THE DECLARATION OF MR. KRAMER. NONE OF THE OTHER WITNESSES TO
14 THE EVENTS THAT HAPPENED TO THE UNITED KINGDOM OR THE LEAD UP
15 TO THOSE EVENTS HAS COME FORWARD.

16 THE COURT: MS. MEHTA, WOULD YOU BE SO KIND TO SLOW
17 DOWN A LITTLE BIT FOR THE COURT REPORTER.

18 MS. MEHTA: CERTAINLY, YOUR HONOR.

19 THE COURT: THANK YOU VERY MUCH.

20 MS. MEHTA: NONE OF THE OTHER WITNESSES TO THE
21 EVENTS IN THE UNITED KINGDOM HAVE STEPPED FORWARD, SO THE ONLY
22 ACCOUNT THAT WE HAVE AT THIS POINT IS MR. KRAMER'S ACCOUNT.
23 AND THAT ACCOUNT IS PRESUMABLY THE BEST VERSION OF THE FACTS
24 FOR MR. KRAMER. EVEN THAT VERSION OF THE FACTS, THE BEST
25 VERSION THEY'VE BEEN ABLE TO COME UP WITH ESTABLISHES THE
26 FOLLOWING ACCORDING TO MR. KRAMER HIMSELF.

1 FIRST, THAT MR. KRAMER REACHED OUT TO MR. COLLINS OF
2 THE DCMS COMMITTEE AND SENT HIM A SUMMARY OF THE ALLEGATIONS
3 OF SIX4THREE'S ALLEGATIONS IN THIS CASE. A SUMMARY WHICH WE
4 AND THE COURT STILL DO NOT HAVE AND WHICH PRESUMABLY HAS
5 CONFIDENTIAL INFORMATION IN IT. AND THAT IS NOT WITHSTANDING
6 THE FACT THAT FACEBOOK HAS REPEATEDLY REQUESTED THAT SUMMARY
7 THIS WEEK AND SIX4THREE'S COUNSEL HAVE FAILED TO TURN IT OVER
8 TO US OR TO THE COURT.

9 BUT THAT IS ACCORDING TO THE DOCUMENT ATTACHED TO
10 MR. KRAMER'S EMAIL, I'M SORRY, TO HIS DECLARATION. AN EMAIL
11 IN WHICH HE SENT THE SUMMARY TO MR. COLLINS. ANOTHER DOCUMENT
12 TO MR. KRAMER'S OWN DECLARATION ESTABLISHES THAT HE SENT A
13 LIST OF DOCUMENTS THAT MR. COLLINS AND THE DCMS COMMITTEE
14 SHOULD REQUEST. A LIST OF THE LITIGATION DOCUMENTS. THAT
15 LIST IS ALSO SOMETHING THAT SIX4THREE AND ITS COUNSEL HAVE
16 FAILED TO DISCLOSE TO THE COURT AND TO FACEBOOK AND, AGAIN,
17 PRESUMABLY ITSELF INCLUDES CONFIDENTIAL INFORMATION.

18 AFTER PROVIDING MR. COLLINS WITH A SUMMARY OF
19 SIX4THREE'S ALLEGATIONS AND A LIST OF DOCUMENTS TO REQUEST
20 FROM THE LITIGATION, MR. KRAMER PROCEEDED OVER THE COURSE OF
21 WEEKS TO ENGAGE WITH THE COMMITTEE. INCLUDING TO CONFIRM IN
22 AN EMAIL THAT HE HAD IN HIS POSSESSION CONFIDENTIAL AND HIGHLY
23 CONFIDENTIAL DOCUMENTS. AND THEN TO DECLINE A VOLUNTARY
24 REQUEST FOR THE DOCUMENTS AND INSTEAD INVITE A FORMAL ORDER OF
25 THE COURT.

26 AFTER COORDINATING FOR WEEKS WITH THE DCMS

1 COMMITTEE, MR. KRAMER TRAVELED TO THE UNITED KINGDOM WITH
2 DOCUMENTS HE NEVER SHOULD HAVE HAD IN THE FIRST PLACE ON HIS
3 LAPTOP FOR SOME UNSPECIFIED BUSINESS AND CHECKED IN TO A HOTEL
4 1500 FEET AWAY FROM PARLIAMENT. WHILE HE WAS THERE, HE
5 RECEIVED ORDERS FROM THE PARLIAMENT REQUESTING THE DOCUMENTS.

6 THOSE ORDERS -- AND THIS IS ALL BASED ON
7 MR. KRAMER'S ACCOUNT. THOSE ORDERS MADE CLEAR THAT MR. KRAMER
8 WOULD STILL BE SUBJECT TO THIS COURT'S JURISDICTION AND ANY
9 VALID ORDER FROM THIS COURT.

10 THE COURT: BEFORE WE GO ANY FURTHER WITH YOUR
11 ARGUMENTS, YOU SAID THAT MR. KRAMER HAD INVITED A FORMAL ORDER
12 OF THE COURT. DID YOU MEAN PARLIAMENT?

13 MS. MEHTA: THAT'S RIGHT.

14 THE COURT: WE HAVE TWO GOVERNMENTAL ENTITIES HERE.
15 AND IT HAS IMPLICATIONS WITH REGARD TO THE HAGUE CONVENTION
16 AND THE LIKE.

17 MS. MEHTA: YOU'RE PROBABLY RIGHT, YOUR HONOR. WHAT
18 I MEANT TO SAY IS HE INVITED A FORMAL ORDER FROM THE U.K.
19 PARLIAMENT FROM THE DCMS COMMITTEE.

20 THE COURT: THANK YOU.

21 MS. MEHTA: AFTER HAVING RECEIVED THE REQUEST FOR
22 THE ORDERS FROM THE PARLIAMENT, HE SAYS THAT HE DECLINED TO
23 COMPLY WITH THEM. THE SECOND ONE HE SAYS WAS DELIVERED TO HIS
24 HOTEL BY THE SERGEANT AT ARMS OF PARLIAMENT. CONTRARY TO
25 PRESS REPORTS, MR. KRAMER'S OWN DECLARATION DOES NOT SAY THAT
26 THE SERGEANT AT ARMS ESCORTED HIM ANYWHERE OR COMPELLED HIM TO

1 DO ANYTHING. RATHER, MR. KRAMER'S OWN DECLARATION SAYS THAT
2 THE SERGEANT AT ARMS SIMPLY DELIVERED THE SECOND ORDER ORDER
3 NUMBER TWO TO MR. KRAMER.

4 TWO HOURS LATER, HE WAS EMAILED THE THIRD ORDER
5 ORDER NUMBER THREE. THEN ACCORDING TO MR. KRAMER'S OWN
6 ACCOUNT, HE VOLUNTARILY WENT 1500 FEET TO PARLIAMENT, SHOWED
7 UP UNANNOUNCED WITH NO APPOINTMENT AND ASKED TO SEE A MEMBER
8 OF PARLIAMENT. HIS STATED INTENTION WAS TO PERSUADE THE
9 MEMBER OF PARLIAMENT THAT HE WOULDN'T BE TURNING OVER OR
10 SHOULDN'T HAVE TO TURN OVER THE DOCUMENTS. NEVERTHELESS,
11 AFTER VOLUNTARILY SHOWING UP TO PARLIAMENT AND COLD-CALLING A
12 MEMBER OF PARLIAMENT, HE BROUGHT WITH HIM THE CONFIDENTIAL
13 DOCUMENTS ON HIS LAPTOP AND A THUMB-DRIVE FOR THE COPYING OF
14 THE DOCUMENTS.

15 AGAIN, ALL OF THIS ACCORDING TO MR. KRAMER'S OWN
16 DECLARATION WHICH IS PRESUMABLY THE MOST FAVORABLE SET OF
17 FACTS FOR HIM AND HAS NOT YET BEEN SUBJECT TO
18 CROSS-EXAMINATION.

19 THEN, AFTER TURNING OVER SOME UNSPECIFIED SET OF
20 CONFIDENTIAL AND HIGHLY CONFIDENTIAL DOCUMENTS TO THE DCMS
21 COMMITTEE, MR. KRAMER BY HIS OWN ACCOUNT LEFT THE UNITED
22 KINGDOM, DIDN'T CALL HIS LAWYERS TO LET THEM KNOW THIS HAD
23 HAPPENED, DIDN'T ADVISE THE COURT OR FACEBOOK THAT THIS HAD
24 HAPPENED.

25 INSTEAD, HE LEFT THE UNITED KINGDOM, FLEW HOME TO
26 NEW YORK, HAD THANKSGIVING WITH HIS FAMILY AGAIN WITHOUT

1 TELLING ANYONE THAT HE HAD VIOLATED THIS COURT'S ORDERS. THEN
2 SPENT THE FOLLOWING MORNING COLLECTING HIS RECORDS ABOUT THE
3 VIOLATION OF THE COURT ORDER. AND ONLY ON FRIDAY AFTERNOON,
4 TWO DAYS AFTER HE HAD TURNED THE DOCUMENTS OVER TO THE DCMS
5 COMMITTEE ON THIS VOLUNTARY VISIT TO PARLIAMENT DID HE EVEN
6 LET BY HIS OWN ACCOUNT HIS LAWYERS KNOW WHO THEN LET FACEBOOK
7 AND THE COURT KNOW.

8 THOSE ARE THE FACTS THAT WE HAVE NOW BASED ON
9 MR. KRAMER'S UNCONTESTED VERSION OF THE FACTS. WHAT WE ARE
10 ASKING FOR, YOUR HONOR, IS DISCOVERY THAT WOULD ALLOW FACEBOOK
11 AND MORE IMPORTANTLY THE COURT TO GET TO THE BOTTOM OF WHAT
12 ACTUALLY HAPPENED HERE. AND THE EXTENT WHICH FACEBOOK
13 CONFIDENTIAL INFORMATION REMAINS AT RISK OF IMPROPER
14 DISCLOSURE. AND THE EXTENT TO WHICH INDIVIDUALS ASSOCIATED
15 WITH SIX4THREE HAVE VIOLATED THE COURT'S ORDERS INCLUDING
16 MR. KRAMER, MR. SCARAMELLINO, COUNSEL OF RECORD FOR SIX4THREE
17 AND POTENTIALLY OTHERS.

18 WE DON'T KNOW THE FULL EXTENT OF WHAT WAS BREACHED,
19 WHO BREACHED IT OR HOW INVOLVED ANY OF THESE INDIVIDUALS WERE
20 IN THE DECISION TO VIOLATE THIS COURT'S ORDER. WE'VE MADE A
21 NUMBER OF REQUESTS FOR DISCOVERY IN TERMS OF WRITTEN DOCUMENTS
22 AND DEPOSITIONS OF THE RELEVANT PARTIES IN OUR EX PARTE
23 PAPERS. I'M HAPPY TO GO THROUGH THOSE ALL. IF YOU'D LIKE, I
24 COULD LIST THEM OR IF YOU PREFER, WE COULD REFER TO THE
25 VERSION OF THE DOCUMENT REQUEST AND DEPOSITION REQUEST IN THE
26 EX PARTE APPLICATION, YOUR HONOR.

1 THE COURT: WHO DO YOU PLAN ON DEPOSING IN THIS
2 CASE? ASSUMING, OF COURSE, THAT I REOPEN DISCOVERY FOR THE
3 EXPRESSED PURPOSE OF LIMITED DISCOVERY AS TO WHO IS
4 RESPONSIBLE FOR WHAT HAPPENED.

5 MS. MEHTA: CORRECT, YOUR HONOR. SO IF WE ARE GOING
6 TO REOPEN DISCOVERY NOT AS TO THE MERITS OF THE CASE BUT AS TO
7 THE QUESTION OF THE BREACH OF THE COURT'S ORDERS, WHICH WE
8 THINK IS APPROPRIATE AND WE'RE REQUESTING. WHAT WE WOULD LIKE
9 FIRST IS DOCUMENT DISCOVERY AND FORENSIC INSPECTION OF
10 MR. KRAMER AND HIS COUNSEL'S LAPTOPS AND THE THUMB-DRIVE, IF
11 IT'S STILL IN HIS POSSESSION.

12 ONCE WE HAVE THE FORENSIC IMAGES OF ALL OF THOSE
13 ELECTRONIC REPOSITORIES, WE'D ALSO LIKE IN PARALLEL TO THAT
14 ANY LOGS OR RECORDS ASSOCIATED WITH THE DROPBOX ACCOUNT. AND
15 WE'D LIKE THE FOLLOWING SETS OF THE DOCUMENTARY EVIDENCE
16 RELATING TO THESE EVENTS.

17 SO, FIRST, WE WANT WRITTEN COMMUNICATIONS BETWEEN
18 ANYONE ON THE SIX4THREE SIDE. AND THAT WOULD INCLUDE
19 MR. KRAMER, MR. SCARAMELLINO WHO IS A PART OF THE LEGAL TEAM,
20 MR. GODKIN, MR. KRUZER, MR. GROSS AND ANYONE ELSE ASSOCIATED
21 WITH SIX4THREE. AND ANYONE THAT THEY INTERACTED WITH WITH
22 REGARD TO FACEBOOK'S CONFIDENTIAL INFORMATION.

23 ALL THE EMAILS. ANY WRITTEN COMMUNICATIONS WE'D
24 LIKE. THAT WOULD INCLUDE AT A MINIMUM THE THREE ATTACHMENTS
25 TO MR. KRAMER'S OCTOBER 1ST EMAIL WHICH HAVE BEEN WITHHELD
26 FROM THE COURT AND FROM FACEBOOK. PRESUMABLY THERE ARE OTHER

1 WRITTEN DOCUMENTS THAT WOULD FOLLOW IN THE SCOPE OF THAT THAT
2 WE THINK THE COURT IS ENTITLED TO AS WELL.

3 WE ALSO BELIEVE THAT DOCUMENTS AND PHONE LOGS
4 SHOWING ANY TELEPHONE OR VIDEO CONFERENCE COMMUNICATIONS
5 BETWEEN THE INDIVIDUALS ASSOCIATED WITH SIX4THREE AND THIRD
6 PARTIES WOULD BE APPROPRIATE. BASED ON THE LIMITED WRITTEN
7 RECORD WE HAVE, IT APPEARS THAT THERE WOULD HAVE BEEN
8 TELEPHONE CONVERSATIONS THAT RELATED TO THIS BREACH OF THE
9 COURT'S ORDERS AND TELEPHONE LOGS OR OTHER DOCUMENTS SHOWING
10 THOSE CONVERSATIONS WOULD BE PROBATIVE TO THE COURT'S
11 INVESTIGATION INTO THE VIOLATION OF THE COURT'S ORDER.

12 WE'D ALSO LIKE TO KNOW THAT DOCUMENTS SUFFICIENT TO
13 SHOW ANY OTHER INDIVIDUALS OR ENTITIES TO WHOM SIX4THREE HAS
14 DISCLOSED OR DISCUSSED FACEBOOK'S CONFIDENTIAL INFORMATION.

15 THERE ARE ENOUGH RED FLAGS HERE ON THIS RECORD WITH
16 RESPECT TO THE DISREGARD OF CONFIDENTIALITY OBLIGATIONS THAT
17 WE BELIEVE AND WE EXPECT YOUR HONOR WOULD WANT TO CONFIRM THAT
18 THERE MAY HAVE BEEN OTHER BREACHES OF CONFIDENTIALITY. AND WE
19 NEED TO FIGURE OUT WHAT THOSE WERE AND MAKE SURE THAT WE KNOW
20 THE FULL EXTENT OF THAT SO THAT YOUR HONOR CAN TAKE THE
21 APPROPRIATE MEASURES.

22 BEYOND THAT AND THE DROPBOX, WE'D ALSO LIKE TO ASK
23 FOR YOUR HONOR TO ORDER DEPOSITIONS. AND THE DEPOSITIONS
24 WOULD INCLUDE MR. KRAMER, MR. SCARAMELLINO, MR. GODKIN AND
25 MR. GROSS. DEPENDING ON WHAT WE LEARN THROUGH THE DOCUMENTS
26 AND THROUGH THE DEPOSITIONS, IT'S CONCEIVABLE THAT ADDITIONAL

1 PERSONS MIGHT NEED TO BE SUBJECT TO DEPOSITION. BUT WE KNOW
2 FROM THEIR RECORD THAT THEY HAVE PRESENTED THAT AT LEAST THOSE
3 FOUR INDIVIDUALS WERE ACTIVELY INVOLVED IN THE VIOLATION OF
4 THIS COURT'S ORDER. AND ONLY THEY WILL KNOW THE FACTS AS TO
5 HOW IT CAME ABOUT AND WHO WAS INVOLVED TO WHAT EXTENT.

6 SO THAT WOULD BE THE DISCOVERY THAT WE ARE
7 REQUESTING, YOUR HONOR. AND WE'RE REQUESTING THAT THAT
8 DISCOVERY HAPPEN IMMEDIATELY. AND BY "IMMEDIATELY," WE WOULD
9 RESPECTFULLY SUGGEST, YOUR HONOR, THAT WHEN MR. KRAMER TURNS
10 IN HIS LAPTOP, HE TURNS HIS LAPTOP OVER TONIGHT THAT IT BE
11 TURNED OVER NOT TO MR. GROSS WHO INSTRUCTED MR. KRAMER TO
12 DELETE EVIDENCE JUST LAST WEEK. BUT INSTEAD TO A FORENSIC
13 RECOVERY FIRM THAT CAN TAKE POSSESSION OF MR. KRAMER'S LAPTOP,
14 THE LAPTOP OF COUNSEL, THE THUMB-DRIVE AND ANY OTHER
15 ELECTRONIC SYSTEMS THAT WERE INVOLVED IN THIS AND CAN START
16 THE PROCESS OF A FORENSIC RECOVERY SO THAT WE CAN TRY TO
17 DETERMINE WHAT EVIDENCE THERE IS THAT'S A VIOLATION OF THE
18 COURT'S ORDER. RATHER THAN ALLOW FACEBOOK CONFIDENTIAL
19 INFORMATION TO REMAIN IN THE POSSESSION OF INDIVIDUALS WHO
20 HAVE ALREADY SHOWN A DISREGARD FOR THIS COURT'S ORDER AND
21 THEIR OBLIGATION UNDER THE COURT'S ORDERS.

22 THAT'S ONE THING THAT WE NEED IMMEDIATELY. THE
23 OTHER THING THAT WE NEED IMMEDIATELY IS ALL OF THE DOCUMENTS
24 TO BE PRODUCED AND FOR THE DEPOSITIONS TO PROCEED PROMPTLY.
25 AND BY "PROMPTLY" WE MEAN IN THE NEXT WEEK. AND THE REASON
26 FOR THAT IS, FIRST, THAT SIX4THREE AND ITS COUNSEL HAVE

1 ALREADY ADMITTED TO TAKING STEPS TO TRY TO DESTROY EVIDENCE OF
2 THE BREACH ITSELF THROUGH THEIR INSTRUCTION TO THEIR CLIENT TO
3 DELETE FROM THE LAPTOP RECORDS THAT MIGHT SHOW WHAT DOCUMENTS
4 WERE PROVIDED TO PARLIAMENT TO THE DCMS COMMITTEE.

5 SECONDLY, MR. KRAMER ALREADY CLAIMS THAT HE CAN'T
6 REMEMBER THINGS THAT HAPPENED JUST LAST WEEK. WITH EVERY
7 PASSING DAY, WE RISK FURTHER CLAIMS OR SUGGESTIONS THAT THE
8 PEOPLE THAT WOULD KNOW WHAT HAPPENED HERE NOW CAN'T REMEMBER
9 WHAT HAPPENED. AND THE FURTHER CLAIMS OF LOSS OF MEMORY
10 PREJUDICE THIS COURT'S ABILITY TO GET TO THE BOTTOM OF WHAT
11 HAS HAPPENED HERE.

12 AND, FINALLY, BECAUSE SIX4THREE AND ITS COUNSEL HAVE
13 SHOWN A CAVALIER DISREGARD FOR THE COURT'S ORDERS AND THE
14 CONFIDENTIALITY OBLIGATIONS THEY HAVE AS LITIGANTS AND MEMBERS
15 OF THE BAR, EVERY DAY EVERY MOMENT THAT THEY CONTINUE TO
16 POSSESS FACEBOOK CONFIDENTIAL INFORMATION, THERE IS A
17 HEIGHTENED RISK THAT WE WILL CONTINUE TO HAVE SUCH BREACHES.

18 SO WHAT WE WOULD PROPOSE, YOUR HONOR, IS THAT WE
19 IMMEDIATELY MEANING BY 5:00 O'CLOCK ON FRIDAY GET ALL OF THE
20 DOCUMENTS THAT WE HAVE REQUESTED WHICH SHOULD ALLOW THE COURT
21 TO GET TO THE BOTTOM OF WHAT HAD HAPPENED HERE. DEPOSITIONS,
22 WE'RE READY TO GO AS SOON AS THOSE DOCUMENTS ARE PRODUCED.
23 TUESDAY, WEDNESDAY NEXT WEEK WE'RE READY TO TAKE THOSE
24 DEPOSITIONS.

25 AND THEN WE WOULD ASK THAT IMMEDIATELY AFTER THE
26 DEPOSITIONS, WE SET A BRIEFING SCHEDULE FOR EXPEDITED BRIEFING

1 ON THE IMPLICATIONS OF WHAT WE LEARN IN DISCOVERY. THAT WOULD
2 INCLUDE BRIEFING ON THE EXTENT OF THE VIOLATION OF THE COURT'S
3 ORDER. THE EXTENT OF EXFOLIATION OF EVIDENCE. WHO WAS
4 INVOLVED, TO WHAT EXTENT AND WHAT THE APPROPRIATE REMEDIES
5 SHOULD BE INCLUDING, FOR EXAMPLE, TERMINATING IN MONETARY
6 SANCTIONS AND POTENTIALLY WHETHER CONTEMPT PROCEEDINGS SHOULD
7 BE INITIATED AT THAT POINT.

8 BUT THE BRIEFING SCHEDULE WOULD ALLOW US TO SHARE
9 WITH THE COURT EVERYTHING THAT WE LEARNED THROUGH DISCOVERY
10 AND THEN WHAT WE THINK POTENTIAL REMEDIES MIGHT BE SO YOUR
11 HONOR COULD CONSIDER THOSE AND TAKE THE APPROPRIATE STEPS.
12 THANK YOU, YOUR HONOR.

13 THE COURT: THANK YOU, MS. MEHTA. NOW, COUNSEL FOR
14 PLAINTIFF, MR. GODKIN, YOU MAY BEGIN YOUR ARGUMENTS. BUT
15 BEFORE YOU PRESENT YOUR ARGUMENT, MR. GODKIN, YOU SUBMITTED A
16 THREE-PAGE LETTER THAT'S DATED NOVEMBER 29TH, 2016, THAT'S
17 THREE PAGES IN LENGTH. AND I HAVE A FEW QUESTIONS WITH REGARD
18 TO THAT LETTER. ALL RIGHT.

19 MR. GODKIN: YES, YOUR HONOR.

20 THE COURT: ALL RIGHT. FIRST, WHY WAS THE DROPBOX
21 FOLDER CREATED?

22 MR. GODKIN: YOUR HONOR, IT IS MY UNDERSTANDING THAT
23 SIX4THREE MAINTAINS ITS CORPORATE RECORDS ON THIS DROPBOX
24 ACCOUNT. THE -- WE HAVE NOT ACCESSED THE DROPBOX ACCOUNT.

25 THE COURT: WHO ARE "WE"?

26 MR. GODKIN: ME, MY LAW FIRM. I BELIEVE MR. GROSS

1 HAS ACCESSED IT ONE TIME FOR THE PURPOSE OF TRYING TO ASSESS
2 WHAT HAD HAPPENED HERE. THE DROPBOX FOLDER IN QUESTION, IT IS
3 MY UNDERSTANDING THAT -- AND THIS IS WHAT WE LEARNED FOR THE
4 FIRST TIME LAST WEEK ON MONDAY OR TUESDAY THAT MR. KRAMER HAD
5 ACCESS TO IT.

6 YOUR HONOR, I WOULD LIKE TO BE -- I COMPLETELY AGREE
7 WITH YOUR HONOR THAT THIS IS AN EXTRAORDINARILY SERIOUS
8 MATTER. AND TO THE EXTENT THAT YOUR ORDER STATED THAT COUNSEL
9 INSTRUCTED MR. KRAMER TO DESTROY EVIDENCE, I WANT TO BE CLEAR
10 THAT IT WAS NOT OUR INTENT THAT HE DESTROY ANY EVIDENCE. AND,
11 IN FACT, IT'S OUR BELIEF THAT NO EVIDENCE WAS DESTROYED.

12 OUR REACTIONS TO THIS SITUATION BEGINNING LAST WEEK
13 AS SOON AS WE LEARNED OF IT WAS, FIRST, WHEN WE LEARNED THAT
14 MR. KRAMER WAS IN LONDON ON MONDAY, I BELIEVE, THE 19TH AND WE
15 LEARNED THAT INFORMATION WAS AVAILABLE TO HIM THAT WAS NOT
16 SUPPOSED TO BE AVAILABLE TO HIM, WE IMMEDIATELY TOOK STEPS TO
17 ATTEMPT TO PREVENT THE INAPPROPRIATE DISCLOSURE OF ANY OF THAT
18 INFORMATION TO PARLIAMENT OR ANYONE ELSE.

19 MS. MEHTA: YOUR HONOR, I REALLY APOLOGIZE FOR
20 INTERRUPTING. BUT AT THIS POINT MR. GODKIN IS TESTIFYING AS A
21 PERCIPIENT WITNESS AS OPPOSED TO PRESENTING ARGUMENT. AND HE
22 SHOULD BE SWORN IN AND SUBJECT TO CROSS-EXAMINATION.

23 THE COURT: I THINK SO TOO.

24 MR. GODKIN: YOUR HONOR, I WAS TRYING TO ANSWER YOUR
25 QUESTION.

26 THE COURT: WELL, AGAIN, THERE ARE A COUPLE OF

1 PROCEDURAL ISSUES THAT WE HAVE. FIRST OF ALL, I HAVE SOME
2 QUESTIONS THAT I WANT TO HAVE ANSWERED REGARDING THE DROPBOX
3 BECAUSE SHOULDN'T THE FOLDER DROPBOX FOLDER REALLY BE ON
4 COUNSEL'S DROPBOX? SHOULDN'T COUNSEL HAVE THEIR OWN DROPBOX
5 AND NOT THE PRINCIPAL PLAINTIFF IN THE CASE?

6 MR. GODKIN: YES, I AGREE WITH YOU, YOUR HONOR.

7 THE COURT: WHY WASN'T THAT DONE?

8 MR. GODKIN: IT HAS BEEN DONE, YOUR HONOR.

9 THE COURT: FIRST OF ALL, YOU HAVE DOCUMENTS THAT
10 WERE FOR ATTORNEY'S EYES ONLY PURSUANT TO THE CONFIDENTIALITY
11 AGREEMENT, THE PROTECTIVE ORDER THAT WAS ISSUED BACK IN 2016,
12 CORRECT?

13 MR. GODKIN: YES, YOUR HONOR.

14 THE COURT: AND BY DESIGN, THE PRINCIPAL WOULD NOT
15 HAVE ACCESS TO THOSE DOCUMENTS.

16 MR. GODKIN: AND, YOUR HONOR, IT'S MY UNDERSTANDING
17 THAT HE DID NOT HAVE ACCESS TO THE FOLDERS ON WHICH THOSE
18 HIGHLY CONFIDENTIAL DOCUMENTS WERE PLACED.

19 THE COURT: WELL, I'M TRYING TO UNDERSTAND HOW
20 FUNDAMENTALLY IF THAT PROTECTIVE ORDER LIMITS THE
21 ACCESSIBILITY TO THOSE DOCUMENTS TO COUNSEL ESSENTIALLY FOR
22 COUNSEL'S EYES ONLY. AND THAT MR. KRAMER WOULD ONLY BE PRIVY
23 TO THOSE DOCUMENTS IN THE EVENT THAT THERE WAS SOMETHING
24 DURING THE COURSE OF THE LAWSUIT THAT WOULD TRIGGER HIS
25 PARTICIPATION OR SOMEHOW REQUIRE HIS REVIEW OF THOSE
26 DOCUMENTS; IS THAT CORRECT?

1 MR. GODKIN: THAT'S CORRECT, YOUR HONOR. BUT IN
2 ADDITION TO COUNSEL, I BELIEVE THE PROTECTIVE ORDER ALLOWS
3 COUNSEL TO ENGAGE CONSULTANTS WHO AGREE TO BE BOUND BY THE
4 TERMS.

5 THE COURT: THAT'S TRUE BUT THAT'S NOT RELEVANT
6 HERE. I READ IT. I AM FULLY AWARE AND WELL VERSED IN WHO IS
7 ALL INVOLVED IN THE PROTECTIVE ORDER. THAT IS TO SAY I
8 UNDERSTAND THAT THERE ARE OTHER INDIVIDUALS IF THEY NEED TO BE
9 CONSULTED THAT WOULD BE BOUND BY THE PROTECTIVE ORDER.

10 SO, COUNSEL, AT ISSUE YOU DIRECTED YOUR LEGAL STAFF
11 TO MOVE ANY FOLDERS THAT CONTAINED HIGHLY CONFIDENTIAL
12 DOCUMENTS FROM SIX4THREE'S DROPBOX ACCOUNT TO MR. GROSS'S
13 FIRM'S CLOUD FILE SYSTEM, CORRECT?

14 MR. GODKIN: YOUR HONOR, AS SOON AS WE LEARNED THAT
15 DOCUMENTS HAD BEEN PLACED ON SIX4THREE'S DROPBOX WHICH WAS --
16 THIS WAS LAST WEEK, WE WERE NOT AWARE THAT THESE -- THESE
17 UNREDACTED BRIEFINGS AND DECLARATIONS AND EXHIBITS AND THE
18 LIKE HAD BEEN MOVED ANYWHERE. AS SOON AS WE LEARNED THAT LAST
19 WEEK, WE TOOK STEPS TO MOVE EVERYTHING ONTO MR. GROSS'S BOX
20 SYSTEM WHICH IS AS I UNDERSTAND IT A SIMILAR TYPE OF SYSTEM TO
21 WHICH ONLY MR. GROSS HAS ACCESS.

22 THE COURT: MR. SCARAMELLINO HAS BEEN INVOLVED IN
23 THIS CASE. IS HE PART OF SIX4THREE'S LEGAL STAFF?

24 MR. GODKIN: HE'S PART OF MY LEGAL TEAM, YOUR HONOR.
25 SIX4THREE DOES NOT HAVE A LEGAL STAFF, BUT HE HAS BEEN PART OF
26 THE LEGAL TEAM. IN FACT, THAT ISSUE WAS RAISED IN FRONT OF

1 JUDGE WEINER. AND SHE APPROVED MR. SCARAMELLINO BEING PART OF
2 THE TEAM GOING FORWARD.

3 THE COURT: SO MR. SCARAMELLINO ACCESSED AND EDITED
4 FILES IN SIX4THREE'S DROPBOX? IS THAT WHAT YOU SAID IN YOUR
5 LETTER?

6 MR. GODKIN: I BELIEVE THAT'S THE CASE, YOUR HONOR.
7 WHAT WE DIDN'T LEARN UNTIL LAST WEEK WAS THAT MR. KRAMER HAD
8 ACCESS TO THOSE FILES. AND THAT IS WHY WE IMMEDIATELY TOOK
9 STEPS TO TRY TO ELIMINATE MR. KRAMER'S ACCESS TO THINGS HE
10 WASN'T ENTITLED TO HAVE ACCESS TO. AGAIN, ALL THIS BEFORE HE
11 TURNED ANYTHING OVER TO PARLIAMENT. I WOULD SAY, YOUR HONOR,
12 ALSO I NEED TO SAY THAT THIS WHOLE SITUATION HAS CREATED
13 SERIOUS ISSUES FOR US UNDER THE RULES OF PROFESSIONAL
14 RESPONSIBILITY AS TO WHETHER WE CAN CONTINUE TO ACT AS COUNSEL
15 FOR SIX4THREE IN THIS MATTER.

16 AND IF WE HAVE CONCLUDED THAT WE CANNOT, WE ARE
17 STILL COUNSEL OF RECORD OF COURSE UNTIL SIX4THREE SHOULD
18 ENGAGE REPLACEMENT COUNSEL. WE HAVE INFORMED THEM OF THAT
19 FACT AND ARE AWAITING INSTRUCTIONS.

20 MR. GROSS: YOUR HONOR, TO BE CLEAR, THAT'S MY FIRM
21 AS WELL.

22 MR. GODKIN: THAT'S BIRNBAUM & GODKIN AND GROSS &
23 KLEIN.

24 THE COURT: MR. GODKIN, YOU REPRESENTED THAT THE
25 FILE TRANSFER TO MR. GROSS'S ACCOUNT OCCURRED FROM
26 NOVEMBER 20TH THROUGH NOVEMBER 27TH; IS THAT CORRECT?

1 MR. GODKIN: THAT'S MY UNDERSTANDING, YOUR HONOR.

2 THE COURT: DURING THIS TIME THAT IS DURING THIS
3 TRANSFER PERIOD, WHAT ACTIONS DID YOU TAKE TO MAKE THE DATA
4 UNAVAILABLE TO SIX4THREE'S DROPBOX, UNAVAILABLE TO MR. KRAMER
5 AS THE ADMINISTRATOR?

6 MR. GODKIN: MAY I ASK MR. GROSS 'CAUSE HE ACTUALLY
7 HANDLED THAT TO RESPOND TO THAT QUESTION?

8 MR. GROSS: I'M HAPPY TO RESPOND, YOUR HONOR.
9 THE -- SO I GOT -- WHILE THIS WAS OCCURRING, ONE OF THE THINGS
10 THAT I DID WAS GO TO MR. KRAMER AND GET THE PASSWORD TO THAT
11 DROPBOX AND LOOK TO SEE IN THAT DROPBOX WHAT ITS SITUATION
12 WAS. WHAT IT APPEARS TO BE I DID NOT WANT TO MODIFY ANYTHING
13 IN THAT DROPBOX THAT APPEARS TO BE THAT A NUMBER OF FILES HAD
14 BEEN MARKED AND FOLDERS HAD BEEN MARKED FOR DELETION. NOW,
15 I -- I DIDN'T WANT TO DO ANY CHANGES WHATSOEVER.

16 BUT -- SO I GAVE INSTRUCTIONS. WITHOUT WAIVING
17 PRIVILEGE, THERE'S INSTRUCTIONS WERE MADE TO RESTRICT ACCESS.
18 MY DESIRE WAS TO TAKE CONTROL OF THE DROPBOX ACCOUNT, BUT I
19 DID NOT WANT TO ROUGH FOUL OF THE COURT'S ORDER CONCERNING
20 MODIFICATIONS. THE DOCUMENTS IN QUESTION DURING THE TRANSFER
21 WERE IN POSSESSION OF MR. SCARAMELLINO. THEY WERE ON HIS
22 LOCAL MACHINE. AND HE WAS IN CHARGE OF DOING THE UPLOADING TO
23 MY SYSTEM.

24 THE COURT: OKAY.

25 MR. GROSS: AND IN TERMS OF HIS -- MR. KRAMER COULD
26 NOT GET ACCESS TO MY SYSTEM BECAUSE HE IS NOT INVITED TO THAT,

1 AND YOU HAVE TO BE INVITED TO THAT LOCATION TO ACCESS IT.

2 THE COURT: MR. GROSS, YOU SAID IN YOUR DECLARATION
3 EXECUTED ON NOVEMBER 26, 2018, AT PARAGRAPH 11 THAT YOU TOOK
4 FURTHER ACTIONS TO ENSURE THAT QUOTE "THE AFOREMENTIONED
5 FOLDER WAS IN FACT" -- "WAS DELETED FROM SIX4THREE'S DROPBOX"
6 CLOSE QUOTE WHEN MR. GODKIN STATES THAT THE DATA TRANSFER WAS
7 NOT COMPLETED UNTIL NOVEMBER 27TH SET FORTH IN THE FOOTNOTE
8 NUMBER 3 OF PAGE 2 OF MR. GODKIN'S LETTER DATED NOVEMBER 29TH,
9 2018. SO IS THAT CORRECT?

10 MR. GROSS: YEAH, I WAS GOING TO CLARIFY. I
11 APOLOGIZE FOR TALKING OVER YOU.

12 THE COURT: WHAT ACTIONS DID YOU TAKE TO DELETE THE
13 LOCAL FILES FROM MR. KRAMER'S LAPTOP?

14 MR. GROSS: I DID NOT PERSONALLY TAKE THOSE ACTIONS.
15 BUT TO BE CLEAR, THE -- THERE WERE DOCUMENTS THAT WERE ON THE
16 DROPBOX THAT WE LEARNED PRIOR TO HIS DISCLOSURE TO PARLIAMENT.
17 SO PRIOR TO HIS DISCLOSURE TO PARLIAMENT, WE LEARNED THAT
18 THERE WERE DOCUMENTS ON AN ACCOUNT THAT HE COULD HAVE ACCESS
19 TO. SO OUR IMMEDIATE IMPULSE AND BOOM BOOM WAS TO BRING HIM
20 INTO COMPLIANCE WITH THE COURT'S PROTECTIVE ORDER. SO THE
21 INSTRUCTIONS WERE TO -- THE EFFORTS WERE TO GET THOSE
22 DOCUMENTS ONTO A LOCAL MACHINE BECAUSE THOSE TWO PROGRAMS DO
23 NOT TALK TO EACH OTHER.

24 SO GET THOSE -- WHAT I MEAN BY THAT, YOUR HONOR, IS
25 THERE'S NOT AN EASY AUTOMATED WAY TO SAY "FLIP SWITCH.
26 TRANSFER FROM ONE SYSTEM TO THE OTHER." SO THEY NEED TO GET

1 DOWNLOADED ONTO MR. SCARAMELLINO'S MACHINE AND THEN ONTO MY
2 SYSTEM.

3 THE COURT: I HATE TO BE REDUNDANT IN MY QUESTIONS.
4 I WANT TO RETURN TO THE FUNDAMENTAL QUESTION THAT I ASKED AT
5 THE BEGINNING OF THESE QUESTIONS TO THE PLAINTIFF'S COUNSEL
6 WHICH IS IF WE HAVE A PROTECTIVE ORDER THAT'S BEEN IN PLACE
7 FOR TWO YEARS AND IF THOSE DOCUMENTS ARE FOR THE ATTORNEY'S
8 EYES ONLY, HOW DID A PARTY THAT WAS NOT SUPPOSED TO BE PRIVY
9 TO THOSE DOCUMENTS COME INTO POSSESSION OF THOSE DOCUMENTS
10 THAT PARTY BEING THE PLAINTIFF'S PRINCIPAL MR. KRAMER?

11 MR. GROSS: I DON'T HAVE PERSONAL KNOWLEDGE ABOUT
12 THAT, YOUR HONOR. I -- I WAS INVOLVED --

13 THE COURT: HOW CAN YOU NOT HAVE PERSONAL KNOWLEDGE
14 OF THAT OR HOW CAN THE FIRM NOT HAVE PERSONAL KNOWLEDGE WHEN
15 YOU'RE CHARGED WITH THE RESPONSIBILITY OF PROTECTING THOSE
16 DOCUMENTS?

17 MR. GROSS: I UNDERSTAND, YOUR HONOR. I CAME ON AS
18 LOCAL COUNSEL IN APRIL OR MAY OF THIS YEAR, AND SO I HAVE
19 LIMITED KNOWLEDGE. AND I DON'T MEAN -- I'M JUST TRYING TO
20 MAKE CLEAR THE ONLY -- THE FIRST TIME I EVER HEARD OF THAT
21 ACCESS ISSUE WAS NOVEMBER 20TH. AND MY IMMEDIATE AND SOLE
22 GOAL WAS TO CURE THAT.

23 THE COURT: ALL RIGHT. MR. GODKIN, I HAVE THE SAME
24 QUESTION FOR YOU. WE WERE TALKING ABOUT THAT EARLIER. YOU
25 NEVER REALLY ANSWERED THE QUESTION. SO SPECIFICALLY IF YOUR
26 FIRM IS REPRESENTING SIX4THREE AND YOUR FIRM AND OTHERS SET

1 FORTH IN THAT PROTECTIVE ORDER ARE CHARGED WITH RESPONSIBILITY
2 OF PROTECTING THOSE CONFIDENTIAL DOCUMENTS AND THERE ARE ONLY
3 LIMITED CIRCUMSTANCES WHEREBY MR. KRAMER WOULD COME INTO
4 POSSESSION OF THOSE DOCUMENTS OR ALTERNATIVELY VIEW THOSE
5 DOCUMENTS, HOW DID HE BECOME IN POSSESSION OF THOSE DOCUMENTS?

6 MR. GODKIN: YOUR HONOR, WHAT I LEARNED LAST WEEK
7 FOR THE FIRST TIME WAS THAT THE DOCUMENTS WOULD HAVE BEEN
8 PLACED ON SIX4THREE'S DROPBOX SYSTEM.

9 THE COURT: HOW?

10 MR. GODKIN: I DON'T KNOW.

11 THE COURT: WHY?

12 MR. GODKIN: I DON'T KNOW THAT EITHER. BUT THAT IS
13 PRECISELY THE PROBLEM HERE THAT HAS CAUSED US TO HAVE A
14 SERIOUS ISSUE. YOU'RE ABSOLUTELY RIGHT THAT THE -- THE
15 DOCUMENTS THAT WERE PRODUCED BY FACEBOOK IN MY UNDERSTANDING
16 HAVE ALWAYS BEEN COMPLETELY SECURE FROM MR. KRAMER. THE
17 MISTAKE THAT WAS MADE HERE WAS THAT PLEADINGS THAT REFERENCED
18 THOSE DOCUMENTS HAD BEEN PLACED WITHOUT MY FIRM'S KNOWLEDGE
19 ONTO SIX4THREE'S DROPBOX SYSTEM. THAT IS I BELIEVE WHERE THE
20 MISTAKE WAS MADE. AND MY FIRM OBVIOUSLY HAS TO TAKE
21 RESPONSIBILITY FOR FAILING TO ADEQUATELY PROTECT THAT FROM
22 HAPPENING AND WE DO.

23 THAT I BELIEVE IS WHAT HAPPENED. WE DIDN'T LEARN OF
24 IT UNTIL LAST WEEK. AND AS SOON AS WE LEARNED OF IT, WE
25 IMMEDIATELY TRIED TO TAKE STEPS TO FIX IT. BUT I DO WANT TO
26 STRESS, YOUR HONOR, THAT WE WERE -- WE WERE IN NO WAY

1 INTENDING TO DESTROY EVIDENCE. WHAT WE WERE INTENDING TO DO
2 IS CORRECT A PROBLEM THAT WE DISCOVERED THAT WAS SERIOUS.

3 THE COURT: WOULDN'T IT BE INTERESTING TO FIND OUT
4 WHAT EXACTLY WAS TRANSMITTED TO THE DCMS FROM MR. KRAMER'S
5 COMPUTER OR FROM THE DROPBOX SUCH THAT IT COULD BE
6 RECONSTRUCTED FOR YOUR PURPOSES?

7 MR. GODKIN: YES, YOUR HONOR. AND I THINK TO THE
8 EXTENT THAT CAN BE DETERMINED IF MR. KRAMER CAN'T SHED LIGHT
9 ON THAT, PERHAPS HIS LAPTOP CAN AND PERHAPS THE DROPBOX FOLDER
10 CAN. SO MY SUGGESTION IS THAT IN ADDITION TO THE LAPTOP, THAT
11 STEPS BE TAKEN IMMEDIATELY TO MAKE SURE THAT NO ONE HAS ACCESS
12 TO THE DROPBOX SYSTEM FOLDER ANY LONGER. THE PASSWORD NEEDS
13 TO BE CHANGED, I BELIEVE.

14 THE COURT: WHY WAS MR. SCARAMELLINO UPLOADING
15 DOCUMENTS ON SIX4THREE'S DROPBOX? HE'S PART OF YOUR LEGAL
16 STAFF, CORRECT?

17 MR. GODKIN: HE'S PART OF THE LEGAL TEAM AND I DON'T
18 KNOW THE ANSWER. HE SHOULD NOT HAVE DONE THAT. HE HAD COPIES
19 OF DOCUMENTS THAT HE WAS WORKING WITH. IT WAS NOT MY
20 UNDERSTANDING THAT HE WAS PUTTING THEM ON A SIX4THREE SYSTEM
21 THAT MR. KRAMER HAD ACCESS TO.

22 THE COURT: WAS HE AWARE OF THE PROTECTIVE ORDER?

23 MR. GODKIN: ABSOLUTELY, YOUR HONOR.

24 THE COURT: I REFER YOU TO PAGE 2, FOOTNOTE 4 OF
25 YOUR LETTER DATED NOVEMBER 29, 2018. WHEN DID YOU LEARN
26 DROPBOX'S SYNCHING CAPABILITY?

1 MR. GODKIN: JUST LAST WEEK, YOUR HONOR. AND THAT'S
2 WHEN WE LEARNED THAT MR. KRAMER HAD A LOCAL COPY OF DOCUMENTS
3 ON HIS LAPTOP. AND THAT'S WHY WE WERE CONCERNED THAT IF HE
4 STILL HAD A LOCAL COPY OF DOCUMENTS ON HIS LAPTOP THAT HE WAS
5 NOT ENTITLED TO HAVE ACCESS TO, THAT HE SHOULD NO LONGER HAVE
6 ACCESS TO THEM.

7 IT'S OUR UNDERSTANDING THAT IT'S A LOCAL COPY
8 MEANING THAT THE -- THERE IS AN EXACT COPY OF THOSE DOCUMENTS
9 THAT IS NOW HOUSED ON MR. GROSS'S BOX SYSTEM. AND ALL WE DID
10 WAS WE ASKED MR. KRAMER TO DELETE THE LOCAL COPY WHICH WAS NOT
11 A DELETION OF EVIDENCE BECAUSE THE FILES THAT WERE THERE ARE
12 STILL AVAILABLE. TO THE EXTENT IT'S POSSIBLE AND I DON'T KNOW
13 THE ANSWER TO THIS, IT'S A TECHNICAL MATTER. BUT TO THE
14 EXTENT IT'S POSSIBLE TO DETERMINE WHAT HE COPIED FROM HIS
15 LAPTOP ONTO A THUMB-DRIVE, I BELIEVE THAT THOSE -- THAT
16 POSSIBLY CAN BE DETERMINED FROM SYSTEM DATA IN THE COMPUTER
17 ITSELF AS OPPOSED TO WHAT'S ON THE LAPTOP.

18 AND THEN THE OTHER THING WE COULD DO, YOUR HONOR, IS
19 WE COULD -- WE COULD ATTEMPT TO GET BACK FROM OR AT LEAST
20 COPIES FROM DCMS. AS YOU KNOW, WE ASKED FOR THEM TO BE
21 RETURNED BUT THEY REFUSED.

22 THE COURT: SO, AGAIN, HOW DID YOU LEARN ABOUT THIS
23 CAPABILITY?

24 MR. GODKIN: WHEN WE WERE INVESTIGATING LAST WEEK
25 WHEN WE LEARNED OF THIS PROBLEM.

26 MR. GROSS: YOUR HONOR, IF I CAN CLARIFY SLIGHTLY?

1 THE COURT: YES.

2 MR. GROSS: I KNOW THAT DROPBOX HAS THAT CAPABILITY.
3 THE QUESTION WHAT WE DIDN'T KNOW AN ENTERPRISE ACCOUNT IS
4 WHAT -- WE DID NOT UNDERSTAND WAS THAT MR. KRAMER HAD THE
5 SETTING SUCH THAT IT WAS BEING POPULATED ON HIS COMPUTER. SO
6 TO BE CLEAR SO THERE'S NO MISUNDERSTANDING, I UNDERSTAND THAT
7 IT HAS A SYNCHING CAPABILITY. I DID NOT KNOW THAT THAT
8 SYNCHING CAPABILITY HAD BEEN ACTIVATED FOR MR. KRAMER AS TO
9 THE DOCUMENTS IN QUESTION. AND THAT'S WHAT WE LEARNED ON THE
10 23RD WHEN WE LEARNED THAT THE DISCLOSURE HAD OCCURRED.

11 THE COURT: WHO DECIDED MR. KRAMER HAD THE AUTOMATIC
12 SYNCHING CAPABILITY ENABLED?

13 MR. GROSS: I DON'T KNOW.

14 THE COURT: AND WHO BESIDES --

15 MR. GODKIN: I'M SORRY. I DON'T KNOW EITHER, YOUR
16 HONOR.

17 THE COURT: THANK YOU. SO WHO BESIDES MR. KRAMER
18 AND MR. SCARAMELLINO HAD ACCESS TO THE DROPBOX?

19 MR. GODKIN: I DON'T KNOW. I DON'T BELIEVE ANYBODY,
20 BUT I DON'T KNOW.

21 THE COURT: ON THE THIRD FULL PARAGRAPH OF YOUR
22 LETTER DATED NOVEMBER 29TH, YOU STATE AND I QUOTE, "WE ALSO
23 UNDERSTOOD THAT A LOCAL COPY OF ALL THE FILES WAS LOCATED ON
24 MR. SCARAMELLINO'S COMPUTER WHICH WAS IDENTICAL TO THE FILES
25 THAT HAD BEEN ON MR. KRAMER'S COMPUTER."

26 WHAT FORMS THE BASIS FOR THAT DECLARATIVE STATEMENT

1 IN YOUR LETTER?

2 MR. GROSS: MR. SCARAMELLINO WAS INSTRUCTED TO
3 EFFECT THE TRANSFER OF FILES FROM THE DROPBOX ACCOUNT, SO OUR
4 KNOWLEDGE IS BASED ON CONVERSATIONS WITH MR. SCARAMELLINO. SO
5 WE UNDERSTOOD THAT THE METHOD THAT HE WAS TAKING WAS, AS I HAD
6 MENTIONED BEFORE, TO PULL THE DOCUMENTS FROM THE DROPBOX
7 ACCOUNT TO HIS MACHINE. AND THEN FROM HIS MACHINE UP TO THE
8 LOCATION ON MY SYSTEM, YOUR HONOR.

9 THE COURT: OKAY. ON PAGE 3 OF YOUR LETTER,
10 MR. GODKIN. THE FIRST FULL PARAGRAPH YOU STATE, "WE DO NOT
11 HAVE THE TECHNICAL EXPERTISE TO STATE FOR SURE. HOWEVER, IT
12 DOES NOT APPEAR THAT MR. KRAMER'S DELETION OF LOCAL COPIES OF
13 THE DOCUMENTS FROM HIS COMPUTER WOULD AFFECT ANY ELECTRONIC
14 EVIDENCE OF HIS PROVISION OF DOCUMENTS, IF ANY EXISTED.
15 PERIOD. IT APPEARS THAT THIS INFORMATION IF IT EXISTED WOULD
16 BE CONTAINED IN THE SYSTEM LOG OF HIS LAPTOP." PERIOD AND
17 CLOSE QUOTE.

18 WHAT FORMS THE BASIS OF THAT DECLARATIVE STATEMENT,
19 SIR?

20 MR. GODKIN: THAT IS AGAIN FOR MR. GROSS.

21 MR. GROSS: I WILL SPEAK TO THAT, YOUR HONOR.

22 THE COURT: THANK YOU.

23 MR. GROSS: WHEN THIS SITUATION IN PREPARATION FOR
24 THIS SITUATION, I WAS TRYING TO FIGURE OUT. AND MY GOAL HERE
25 IS TO TRY TO GET EVERY -- MAKE THESE THINGS AS CLEAR AS
26 POSSIBLE, BUT I AM NOT A TECHNICAL EXPERT. BUT MY RESEARCH

1 INDICATES THAT WHEN WHAT YOU'RE TRYING TO FIGURE OUT IS
2 WHETHER A DOCUMENT WAS TRANSFERRED FROM AN INTERNAL LOCATION A
3 LOCAL LOCATION ON A PC TO A THUMB-DRIVE, THAT THAT METADATA,
4 IF YOU WILL, THAT IS IF IT EXISTS. WOULD EXIST IN THE SYSTEM'S
5 LOG. THAT IT DOESN'T ACTUALLY GET ATTACHED TO ANY INDIVIDUAL
6 FILE BECAUSE IT IS AN OPERATION OF THE SYSTEM THAT'S DOING
7 THAT. SO THAT'S MY UNDERSTANDING IS THAT IF YOU ARE --

8 IN ORDER TO DO IT IN AN ELECTRONIC FORENSIC WAY TO
9 DETERMINE WHERE WERE -- WERE DOCUMENTS MOVED FROM A LOCATION
10 ON A COMPUTER TO A THUMB-DRIVE? THAT WOULD BE SYSTEMS
11 INFORMATION. IT WOULDN'T BE INFORMATION THAT IS ASSOCIATED
12 WITH ANY PARTICULAR FILE. SO IF THAT FILE NO LONGER WAS
13 THERE, THAT WOULDN'T AFFECT THAT EVIDENCE BECAUSE THAT FILE
14 SIMPLY DOESN'T -- THAT IS NOT RECORDED ON THE METADATA OF THAT
15 FILE. NOW TO BE CLEAR, YOUR HONOR, I'M NOT A FORENSIC EXPERT.
16 SO THIS IS HOW I UNDERSTAND THINGS.

17 THE COURT: MR. GODKIN, YOUR LETTER ON PAGE 3 YOU
18 STATE THAT YOU RECENTLY REVIEWED THE CONTENTS OF THE SIX4THREE
19 DROPBOX ACCOUNT. WHEN DID YOU REVIEW THE CONTENTS OF THIS
20 DROPBOX ACCOUNT?

21 MR. GODKIN: I DID NOT REVIEW IT, YOUR HONOR. I
22 BELIEVE MR. GROSS DID.

23 MR. GROSS: THIS LETTER WAS -- IT WAS SUPPOSED TO BE
24 ALL OF US.

25 THE COURT: A COLLABORATIVE EFFORT?

26 MR. GODKIN: IT WAS A COLLABORATIVE EFFORT, YEAH.

1 WE WANTED TO GET YOUR HONOR THE INFORMATION WE HAD IN ADVANCE
2 OF THE HEARING.

3 THE COURT: ALL RIGHT.

4 MR. GROSS: WE --

5 THE COURT: MR. GROSS, CAN YOU ANSWER THE QUESTION?

6 MR. GROSS: ABSOLUTELY. YES. SO THAT WOULD HAVE
7 BEEN -- I BELIEVE IT WAS TWO DAYS AGO. I ASKED -- I RECEIVED
8 THE PASSWORD AND LOGGED ON TO THE MACHINE -- I'M SORRY -- TO
9 THE DROPBOX ACCOUNT TO DETERMINE WHETHER DOCUMENTS STILL
10 EXISTED THERE OR IN FACT HAD BEEN COMPLETELY DELETED.

11 THE COURT: OKAY. ON PAGE 3 OF THIS LETTER, YOU
12 STATE QUOTE, "IT APPEARS THAT THE DOCUMENTS IN QUESTION HAVE
13 NOT IN FACT BEEN DELETED. PERIOD. THERE ARE A NUMBER OF
14 FOLDERS THAT HAVE BEEN MARKED FOR DELETION, BUT THEY MAY --
15 BUT THEY HAVE NOT ACTUALLY BEEN DELETED." PERIOD. CLOSE
16 QUOTE. WHAT DOES THIS MEAN?

17 MR. GROSS: YEAH. I'LL EXPLAIN THAT, YOUR HONOR.
18 ON THESE SYSTEMS, IT'S SIMILAR. MAYBE ONE WAY TO LOOK AT IT
19 IS LIKE A TRASH CAN. SO WHEN YOU -- AND I'M SPEAKING HERE AS
20 A GENERAL MATTER AS SOMEONE WHOSE USED THESE SYSTEMS IN THE
21 PAST. WHEN YOU USE THESE SYSTEMS AND YOU DELETE SOMETHING, IT
22 MARKS IT FOR DELETION. AND DEPENDING ON THE SETTINGS OF THE
23 ACCOUNT WHICH IS ONE OF THE -- WELL, DEPENDING ON THE SETTINGS
24 OF THE ACCOUNT, THAT THOSE DOCUMENTS WILL EVENTUALLY BE
25 DELETED PERMANENTLY OR NOT. SO THAT'S ONE OF THE REASONS WHY
26 I THINK SOMETHING THAT WE ARE -- WE VERY MUCH WANT TO RESOLVE

1 AS SOON AS POSSIBLE IS GETTING RID OF SOMEHOW IN A WAY THAT
2 THE COURT IS COMFORTABLE WITH THAT MARKING OF DELETION.

3 SO WHEN I WENT ON TO THE LOCATION WHICH IT'S A PLACE
4 ON THE SYSTEM THAT SHOWS YOU WHAT FILES HAVE BEEN DELETED, IT
5 SHOWS IN FOLDERS A WHOLE NUMBER OF FOLDERS THAT ARE DELETED.
6 AND I --

7 THE COURT: I'M SORRY FOR INTERRUPTING.

8 MR. GROSS: NO, I APOLOGIZE.

9 THE COURT: ARE THERE SETTINGS THAT HAVE TIMING
10 INVOLVED 60 DAYS, 120 DAYS, 6 MONTHS, A YEAR?

11 MR. GROSS: SO BECAUSE I WAS NOT THE ADMINISTRATOR
12 OF THIS ACCOUNT, I DO NOT KNOW THAT. I'VE MADE INQUIRIES AND
13 I DON'T HAVE THAT INFORMATION YET, SO THIS IS SOMETHING
14 THAT -- AND I DID NOT WANT TO MYSELF GIVEN THE COURT'S ORDER
15 DO ANYTHING THAT WOULD MODIFY ANY PORTION OF THIS ACCOUNT.

16 THE COURT: WELL, SOMETHING SHOULD BE DONE TO
17 PRESERVE EVERYTHING FOR THE PURPOSES OF THIS TRIAL OR THIS
18 HEARING. THE DECLARATION THAT YOU FILED SAID THAT THE
19 DOCUMENTS WERE DELETED. SO WHICH IS IT, COUNSEL? EITHER THEY
20 WERE DELETED OR THEY ARE SET FOR DELETION?

21 MR. GROSS: UNDERSTOOD, YOUR HONOR. SO -- AND I
22 THINK IT'S IMPORTANT TO BACK UP. WHAT -- WHAT WE -- AGAIN,
23 OUR INTENTION ON THE 23RD WHEN WE HAD LEARNED THAT MR. KRAMER
24 HAD IN FACT PROVIDED THESE DOCUMENTS AND HE HAD ACCESS TO
25 THESE DOCUMENTS, OUR CHIEF -- SO OUR PREVIOUS INTENTION
26 REMAINED THE SAME WHICH IS WE WANTED TO GET HIM IN COMPLIANCE

1 WITH THE PROTECTIVE ORDER.

2 AND IT WAS -- WE FOUND OUT THAT HE NOT ONLY REMAINED
3 OUT OF COMPLIANCE WITH THAT PROTECTIVE ORDER. BUT HAD IN FACT
4 RELEASED DOCUMENTS IN VIOLATION OF OTHER ORDERS BY THE COURT.
5 SO THE INSTRUCTIONS WERE DELETE EVERYTHING THAT YOU HAVE
6 ACCESS TO. NOW, I -- I FEEL LIKE I WAS IN A SOMEWHAT
7 IMPOSSIBLE SITUATION. I'M NOT ASKING FOR ANYBODY'S SYMPATHY.
8 BUT ON THE ONE HAND I'VE GOT A CONTINUING VIOLATION OF AN
9 ORDER -- OF ORDERS THAT I WANT TO TAKE CARE OF AND RESOLVE.
10 AND THEN ON THE OTHER HAND, WE ARE IN THIS SITUATION.

11 MY PRIMARY THOUGHT IN THIS REGARD WAS I KNOW THERE'S
12 A VIOLATION AND WE NEED TO STOP IT. SO THAT SAID, TO YOUR
13 QUESTION. YOUR QUESTION WAS WHICH ONE IS IT? I WAS NOT
14 INVOLVED IN THE ACTUATION OF THE DELETION. BUT WHAT APPEARS
15 TO HAVE OCCURRED IS THEY WERE DELETED, BUT THEY WEREN'T
16 PERMANENTLY DELETED WHICH IS -- SEEMS TO BE A VERY GOOD THING.
17 SO THAT MARKING FOR DELETION THAT I REFERRED TO, THAT APPEARS
18 TO BE WHAT THE RESULT OF THAT WAS.

19 THE COURT: ALL RIGHT. THOSE WERE THE SEVERAL
20 QUESTIONS THAT WERE FOSTERED BY THIS LETTER. AND I WANTED TO
21 HAVE SOME ANSWERS FROM YOU WITH REGARD TO THOSE, THE ISSUES
22 THAT WERE RAISED BY THE LETTER.

23 MR. GROSS: I'M SORRY, YOUR HONOR.

24 THE COURT: YOU MAY PROCEED.

25 MR. GROSS: SO I WAS GOING TO SAY ONE THING AND I
26 DON'T MEAN TO SPEAK OUT OF TURN. BUT AS TO THIS ISSUE OF

1 UNMARKING THESE FILES FOR DELETION, ONE POSSIBLE THING TO
2 CONSIDER IS AN INDEPENDENT THIRD PARTY COULD DO THAT. SO WE
3 COULD AGREE ON AN INDEPENDENT THIRD PARTY WHO WOULD BE GIVEN
4 ACCESS TO THE ACCOUNT AND COULD UNDELETE THOSE. AND I ONLY
5 BRING THAT UP BECAUSE I SHARE THE COURT'S CONCERN. I'M NOT
6 COMFORTABLE WITH THOSE REMAINING MARKED FOR DELETION. AND I
7 WANTED THAT SUGGESTION TO BE OUT THERE, YOUR HONOR.

8 THE COURT: ALL RIGHT. THANK YOU.

9 MR. GODKIN: YOUR HONOR, MAY I CONTINUE?

10 THE COURT: YES.

11 MR. GODKIN: I WANTED ALSO TO ADDRESS WHAT MS. MEHTA
12 IS ASKING FOR. FIRST OF ALL, AS I THINK, WE ALREADY MADE
13 CLEAR. WE THINK THAT IT IS ENTIRELY APPROPRIATE FOR THE COURT
14 TO ORDER ACTIONS TO BE TAKEN IMMEDIATELY FOR THE PURPOSE OF
15 PRESERVING THE EVIDENCE HERE. AND THAT INCLUDES YOUR ORDER
16 THAT MR. KRAMER TURN OVER HIS LAPTOP. AND YOU SAID YOU WERE
17 INCLINED TO TURN IT OVER TO MR. GROSS.

18 ANOTHER OPTION WOULD BE TO TURN IT OVER TO AN
19 INDEPENDENT FORENSIC PERSON WHO UNDERSTANDS THE TECHNOLOGY WHO
20 MIGHT BE ABLE TO TAKE A LOOK AT IT AND PRESERVE IT AND INFORM
21 ALL OF US WHAT ACTUALLY CAN BE LEARNED FROM IT. WE DON'T --
22 WE DO NOT THINK THAT IT IS APPROPRIATE FOR THAT TO BE TURNED
23 OVER TO FACEBOOK OR FACEBOOK'S COUNSEL AT THIS POINT. RATHER
24 IT'S MORE IMPORTANT TO BE TURNED OVER TO A NEUTRAL PERSON WHO
25 CAN FIGURE OUT EXACTLY WHAT THE FACTS ARE FOR THE COURT AND
26 FOR THE PARTIES SO THAT WE CAN TAKE IT FROM THERE.

1 THE COURT: ALL RIGHT. I THINK TIME IS OF THE
2 ESSENCE. I DON'T THINK THERE'S REAL TIME FOR A THIRD PARTY TO
3 UNMARK FOR DELETION AT THIS POINT.

4 MS. MEHTA: I'M SORRY, YOUR HONOR.

5 MR. GODKIN: THAT'S A DIFFERENT ISSUE. I MEANT THE
6 LAPTOP.

7 THE COURT: OKAY.

8 MR. GODKIN: THE UNMARKING FOR DELETION, I AGREE
9 TIME IS DEFINITELY. THAT WAS WHAT WE ASKED FOR IN THE LETTER
10 IS IMMEDIATELY FOR THE PASSWORD OF THAT ACCOUNT TO BE PROVIDED
11 TO, I THINK, AN INDEPENDENT PERSON IS AGAIN SMART. SO THAT IT
12 CAN BE CHANGED AND IS SAFE. AND, ALSO, IF IN FACT IT TURNS
13 OUT THAT THINGS THAT ARE UNMARKED FOR DELETION CAN BE, THAT
14 CAN BE REVERSED SO THAT NOTHING IS DELETED. I THINK THAT
15 WOULD BE PRUDENT AS WELL.

16 THE COURT: HAVE COUNSEL BEEN IN DISCUSSION THAT IS
17 TO SAY DEFENSE COUNSEL AND PLAINTIFFS WITH REGARD TO HOW TO
18 REMEDY THIS PROBLEM?

19 MS. MEHTA: YOUR HONOR, WE HAVE PROPOSED TWICE TO
20 THEM. FIRST ON MONDAY AND AGAIN ON WEDNESDAY THAT A FORENSIC
21 INSPECTION OCCUR WITH RESPECT TO THE LAPTOP.

22 THE COURT: AND IT SHOULD.

23 MS. MEHTA: AND WE HAVE NOT HEARD ANY RESPONSE FROM
24 THEM. WE HAVE AN INDEPENDENT FORENSIC FIRM STROZ FRIEDBERG
25 THAT IS AT READY TO -- SORRY -- STROZ FRIEDBERG IS READY TO
26 TAKE ON THIS PROJECT AS EARLY AS THIS EVENING. SO RATHER THAN

1 HAVE MR. KRAMER TURN THE LAPTOP OVER TO COUNSEL, WE WOULD
2 PROPOSE THAT MR. KRAMER TURN AND COUNSEL TURN THEIR LAPTOPS
3 OVER TO THIS INDEPENDENT FIRM. AND THE FIRM ALSO BE GIVEN
4 ACCESS TO THE DROPBOX, SO THEY CAN TAKE IMMEDIATE STEPS TO
5 PRESERVE ALL RELEVANT EVIDENCE. AND THIS IS A WELL KNOWN
6 INDEPENDENT FORENSIC FIRM THAT HANDLES THIS SORT OF THING
7 REGULARLY.

8 MR. LERNER: YOUR HONOR, IF I MAY QUICKLY ADD?
9 WHAT'S BEING PROPOSED IN TERMS OF THE NEUTRAL IS WHAT IS
10 PROPOSED WHEN PARTIES COMPLY WITH THE PROTECTIVE ORDER AND
11 PRESERVE EVIDENCE AND FOLLOW THE COURT'S ORDERS, AND THEN THE
12 PARTIES AGREE ON A NEUTRAL. AND BECAUSE THAT PROCESS IS TIME
13 CONSUMING, PEOPLE PLAN AHEAD. THAT IS NOT WHAT HAS HAPPENED
14 HERE. AND THEY ARE TRYING TO ESSENTIALLY SET BACK THE CLOCK
15 AS THOUGH THIS VIOLATION DIDN'T TAKE PLACE.

16 WHAT MS. MEHTA AND I ARE DESCRIBING IS WHAT HAPPENS
17 WHEN YOU BREAK THE RULES WHICH IS THE FORENSIC FIRM WE ARE
18 TALKING ABOUT WILL TAKE AN IMAGE WHICH BY THE WAY, ALL OF THE
19 LAWYERS IN THIS CASE KNOW IS THE WAY YOU DO THIS.

20 WHEN A CLIENT CALLS YOU AND SAYS, "I FOUND
21 INFORMATION THAT I DON'T THINK I'M SUPPOSED TO HAVE," NOBODY
22 IN ANY OF THESE TABLES SAYS "DELETE IT." EVERYBODY SAYS,
23 "TAKE AN IMAGE" BECAUSE OTHERWISE NOBODY IS GOING TO KNOW WHAT
24 HAPPENED.

25 AND THEN AFTER YOU'VE TAKEN THAT IMAGE, YOU CAN
26 CLEAN UP THAT COMPUTER. BUT NOT BEFORE. WHAT THEY'RE

1 PROPOSING TURNS IT ON ITS HEAD, WE WILL HAVE THE FORENSIC FIRM
2 TAKE THE IMAGE TONIGHT. WE'RE PERFECTLY HAPPY TO SAY THAT
3 UNTIL FURTHER INSTRUCTION FROM YOUR HONOR, WE'RE NOT GOING TO
4 LOOK AT IT TONIGHT. BUT OUR FIRM NEEDS TO TAKE THAT IMAGE.
5 THE LETTER THAT YOU JUST READ THROUGH SHOWS ERROR AFTER ERROR
6 AFTER ERROR AS TO HOW TO HANDLE THIS EVIDENCE.

7 AS OF RIGHT NOW WE DON'T KNOW WHAT EXISTS, WHO HAS
8 ACCESS TO IT AND WHERE THIS STUFF IS. AND WHO ELSE PERHAPS,
9 BY THE WAY, IS TRAVELING AROUND WITH THIS STUFF. WE DON'T
10 KNOW ANYTHING. IT NEEDS TO BE HANDLED NOW AND WE CAN DO IT.

11 MR. GODKIN: YOUR HONOR, I DON'T THINK WE HAVE ANY
12 PROBLEM WITH AS LONG AS IT'S AN INDEPENDENT FORENSIC EXPERT.
13 WE DO HAVE A PROBLEM, HOWEVER, HAVING INFORMATION IMMEDIATELY
14 TURNED OVER FACEBOOK BECAUSE THERE VERY WELL MAY BE
15 INFORMATION ON THAT COMPUTER THAT'S PROTECTED BY A PRIVILEGE.

16 IT NEEDS TO BE REVIEWED. THERE ARE A LOT OF
17 POTENTIAL PRIVILEGE ISSUES HERE, YOUR HONOR, WHICH BRINGS ME
18 TO SOME OF THE OTHER REQUESTS THAT FACEBOOK HAS MADE FOR
19 TURNING OVER DOCUMENTS. THEY ARE ESSENTIALLY -- AND I
20 COMPLETELY UNDERSTAND WHY, BUT THEY ARE ESSENTIALLY ATTEMPTING
21 TO BURY US HERE AND DO EVERYTHING SO QUICKLY THAT WE DON'T
22 HAVE TIME TO THINK LET ALONE MAKE SURE IT'S DONE PROPERLY.

23 THE COURT: IF I MAY REMIND YOU, MR. GODKIN, THE
24 COURT WAS BURIED WITH MANY DOCUMENTS BEFORE WITH REGARD TO THE
25 MOTION TO SEAL THAT WE PREPARED FOR ON NOVEMBER 1ST. SEEMS
26 SOMEWHAT IRONIC THAT SUDDENLY WE'RE ALL CONCERNED ABOUT BEING

1 BURIED.

2 MR. GODKIN: YOUR HONOR, WHAT I MEAN BY THAT IS THE
3 REQUEST THAT THEY ARE MAKING CERTAINLY FOR THE LAPTOP, THE
4 DROPBOX AND ALL THAT IS PERFECTLY APPROPRIATE. FOR THE THREE
5 DOCUMENTS THAT WERE ATTACHMENTS TO MR. KRAMER'S EMAIL, THOSE
6 CAN BE PRODUCED PROMPTLY. THAT'S SIMPLE.

7 BUT THE REST OF THEIR REQUESTS ARE IN OUR VIEW
8 OVERLY BROAD. THEY ARE ASKING FOR -- FIRST OF ALL, THERE HAVE
9 BEEN NO COMMUNICATIONS WITH THIRD PARTIES REGARDING FACEBOOK'S
10 CONFIDENTIAL INFORMATION. THAT'S ONE OF THE THINGS THEY ARE
11 ASKING FOR.

12 ONE OF THEIR REQUESTS IS SO BROAD IT LITERALLY
13 COVERS EVERY COMMUNICATION BETWEEN AND AMONG ALL OF THE
14 LAWYERS REPRESENTING THE PLAINTIFF IN THIS CASE WHICH IS --
15 INCLUDES ATTORNEY/CLIENT PRIVILEGE MATERIALS, WORK PRODUCT
16 PRIVILEGE MATERIALS. IT'S A -- NUMBER ONE, AN ENORMOUS AMOUNT
17 OF MATERIAL. BUT, NUMBER TWO, IF THE COURT IS INCLINED TO
18 ORDER PRODUCTION OF DOCUMENTS THAT ARE PRIVILEGED, WE WOULD
19 RESPECTFULLY REQUEST A FULL BRIEFING ON WHETHER OR NOT THAT'S
20 APPROPRIATE. WE BELIEVE IT IS NOT. BUT IF THAT -- IF THE
21 COURT IS INCLINED TO ORDER RELIEF OF THAT BREATH, IT'S AN
22 ISSUE OF SUCH IMPORTANCE THAT WE WOULD -- WE WOULD LIKE AN
23 OPPORTUNITY TO FULLY BRIEF IT BEFORE IT HAPPENS.

24 THE REQUEST FOR IMAGING OF ATTORNEYS' LAPTOPS RAISES
25 ENORMOUS PROBLEMS. FIRST OF ALL, WE ALL HAVE MULTIPLE CLIENTS
26 WHO ARE NOT INVOLVED IN THIS LITIGATION. WE ALL HAVE MULTIPLE

1 PERSONAL MATTERS THAT HAVE NOTHING TO DO WITH THIS LITIGATION.
2 THAT WOULD APPEAR ON COMPUTERS. SO THE REQUEST THAT THEY CAN
3 TAKE ACCESS TO ALL OF OUR COMPUTERS REGARDLESS OF WHETHER THE
4 INFORMATION HAS ANY BEARING ON THIS MATTER AND REGARDLESS OF
5 WHETHER ANYTHING IS PRIVILEGED IS SERIOUSLY OVERBROAD AND
6 RAISES VERY VERY SERIOUS QUESTIONS IF THAT WERE -- IF THE
7 COURT WERE INCLINED TO GRANT RELIEF OF THAT BREATH.

8 DEPOSITIONS OF ATTORNEYS, YOUR HONOR. THAT RAISES
9 ADDITIONAL QUESTIONS. AS I MENTIONED EARLIER, WE HAVE
10 CONCLUDED THAT WE HAVE ETHICAL ISSUES THAT ARE GOING TO
11 PRECLUDE US FROM REMAINING IN THIS CASE. ALSO TO THE EXTENT
12 YOU ARE ORDERING US LAWYERS TO PRODUCE DOCUMENTS AND APPEAR
13 FOR DEPOSITION, WE WOULD WANT FIRST TO ENGAGE OUR OWN COUNSEL
14 TO REPRESENT US WITH RESPECT TO THAT AND TO DO THAT IN AN
15 ORDERLY WAY, IF APPROPRIATE.

16 SO THAT IS ANOTHER -- WE DON'T BELIEVE IT'S
17 APPROPRIATE. WE DON'T THINK ANYTHING WE'VE DONE IS IN
18 DISPUTE. WE'VE JUST BEEN REALLY TRYING TO DO OUR BEST HERE.
19 AND FACEBOOK, YOU KNOW, HAS BEEN VERY AGGRESSIVE FOR
20 UNDERSTANDABLE REASONS. BUT TO GO AFTER US PERSONALLY AS WELL
21 AS MR. KRAMER. BUT ONCE WE START HEADING IN THAT DIRECTION,
22 YOUR HONOR, THE ISSUES ARE VERY VERY SERIOUS AND NEED TO BE --
23 WE BELIEVE NEED TO BE TAKEN SERIOUSLY BEFORE YOU WERE TO ORDER
24 THAT. SO WE WOULD REQUEST A FULL OPPORTUNITY TO BE HEARD ON
25 THAT ISSUE. AND IF YOU'RE INCLINED TO GO THAT WAY, THEN WE
26 WOULD ENGAGE OUR OWN COUNSEL TO REPRESENT US IN THAT REGARD.

1 THE COURT: ISN'T THIS A PROBLEM OF THE PLAINTIFFS
2 OWN MAKING?

3 MR. GODKIN: YOUR HONOR, IT PROBABLY IS. BUT --

4 THE COURT: PROBABLY? YOU EQUIVOCATE?

5 MR. GODKIN: NO, YOUR HONOR. IT'S A PROBLEM OF OUR
6 MAKING. HOWEVER, IT RAISES VERY SERIOUS PROBLEMS THAT WE HAVE
7 TO GRAPPLE WITH. YOU KNOW, THIS WHOLE ISSUE BEGAN LAST
8 MONDAY. WE HAD THE THANKSGIVING HOLIDAY IN THE MIDDLE. AND
9 YOU'VE ORDERED US HERE TODAY AND WE'RE HAPPY TO BE HERE, BUT
10 THIS IS GOING -- ONCE WE PRESERVE THE EVIDENCE WHICH IS
11 CRITICAL, THIS IS GOING TO HAVE TO GET SORTED OUT. AND IT'S
12 GOING TO HAVE TO TAKE LONGER THAN, YOU KNOW, PRODUCING
13 DOCUMENTS TONIGHT AND HAVING DEPOSITIONS NEXT WEEK. IT'S JUST
14 PHYSICALLY NOT POSSIBLE FOR THAT TO HAPPEN.

15 THE COURT: I UNDERSTAND. THIS WHOLE DISCLOSURE OF
16 DOCUMENTS TOOK PLACE INTERESTINGLY DURING THE THANKSGIVING
17 HOLIDAYS WHEN THE COURTS WERE NOT IN SESSION AND LAWYERS WERE
18 UNAVAILABLE.

19 MR. GODKIN: WE WERE --

20 THE COURT: I JUST FIND THAT RATHER IRONIC OR RATHER
21 INTERESTING.

22 MR. GODKIN: YOUR HONOR, OBVIOUSLY I APOLOGIZE FOR
23 THAT. I WAS NOT SUPPOSED TO BE WORKING EITHER. AND I'M NOT
24 HAPPY ABOUT IT.

25 THE COURT: WELL, THE PLAINTIFFS AGREE THAT
26 MR. KRAMER SHALL TURN OVER THE LAPTOP AND DROPBOX ACCESS TO

1 THE INDEPENDENT FORENSIC EXAMINER PROPOSED BY FACEBOOK?

2 MR. GODKIN: AS FAR AS SIX4THREE IS CONCERNED, YES.

3 THE COURT: ALL RIGHT. DO YOU NEED TO MEET AND
4 CONFER WITH YOUR COUNSEL FOR A MOMENT?

5 MR. GROSS: SO, YOUR HONOR, THE -- WE DON'T HAVE A
6 PROBLEM WITH THE INDIVIDUAL OR THE FIRM THAT THEY'VE DONE. I
7 THINK WHAT'S IMPORTANT IS THAT THE COURT ORDER THAT NO ONE
8 INCLUDING FACEBOOK OR ANY OF THE DEFENDANTS. AND WE COULD
9 JUST SAY, "NO PARTY OR ATTORNEY OF PARTIES HAS ANY ACCESS TO
10 THESE MATERIALS UNTIL FURTHER ORDER BY THE COURT." WITH THAT,
11 WE HAVE NO PROBLEM AT ALL PROVIDING THAT PERSON.

12 I THINK I WOULD GO ONE STEP FURTHER AND REQUEST THAT
13 THAT -- THAT WE -- OR THAT THE COURT CONSIDER ORDERING THAT
14 INDEPENDENT THIRD PARTY TO TAKE WHATEVER ACTIONS OR THE
15 APPROPRIATE ACTIONS TO ENSURE THAT THE FILES ON THAT DROPBOX
16 WHICH ARE MARKED FOR DELETION DO NOT END UP ULTIMATELY
17 DELETED. THAT MAY BE ABOUT OUR CHANGING THE SETTINGS. BUT
18 REGARDLESS THE MOST IMPORTANT THING IS THAT IF THE COURT ORDER
19 INDICATES THAT IT IS TRULY AN INDEPENDENT PARTY AND WE GO FROM
20 THERE.

21 THE COURT: ALL RIGHT. SO I HEAR THAT THERE IS A
22 STIPULATION WITH SOME LIMITATIONS ON ACCESS; IS THAT RIGHT?
23 YOU AGREE TO TURN THESE DOCUMENTS OVER TO AN INDEPENDENT
24 FORENSIC EXAMINER, CORRECT?

25 MR. GODKIN: THE LAPTOP AND THE ACCESS TO THE
26 DROPBOX.

1 THE COURT: YES. VERY WELL.

2 MS. MEHTA: YOUR HONOR, I WOULD ADD TWO THINGS TO
3 THAT. ONE IS WE STILL DON'T KNOW WHERE THE THUMB-DRIVE IS AND
4 WHETHER MR. KRAMER OR COUNSEL OR MR. SCARAMELLINO HAVE THE
5 THUMB-DRIVE IN THEIR POSSESSION. SO IF THAT THUMB-DRIVE IS
6 ANYWHERE IN SIX4THREE OR ITS COUNSEL'S OR LEGAL TEAM'S
7 POSSESSION, WE ASK THAT THAT BE TURNED OVER THIS EVENING AS
8 WELL.

9 AND THEN WE ASK THAT MR. SCARAMELLINO'S LAPTOP ALSO
10 BE SURRENDERED. MR. SCARAMELLINO ACCORDING TO THE LETTER WE
11 GOT YESTERDAY AND ACCORDING TO COUNSEL'S STATEMENTS TODAY WAS
12 AT THE HEART OF THIS IN TERMS OF GETTING THAT -- IN TERMS OF
13 GETTING THAT INFORMATION TO MR. KRAMER, SO HIS LAPTOP SHOULD
14 ALSO BE IMAGED SO EVIDENCE CAN BE PRESERVED AND THEN THE
15 DROPBOX PASSWORD.

16 THE COURT: THAT RAISES THE ISSUES THAT MR. GODKIN
17 HAD JUST ARTICULATED ON THE RECORD WHICH IS THAT THERE IS
18 ATTORNEY/CLIENT PRIVILEGE ATTACHED TO OTHER CASES THAT MAY BE
19 ON HIS LAPTOP THAT HAVE NOTHING TO DO WITH THE INSTANT CASE.

20 MS. MEHTA: NOT WITH REGARD TO MR. SCARAMELLINO.

21 THE COURT: ALL RIGHT. WELL, IS MR. SCARAMELLINO AN
22 INDEPENDENT CONTRACTOR OR SOMEONE ASSOCIATED WITH THE FIRM AND
23 NOT AN EMPLOYEE OF THE FIRM?

24 MR. GODKIN: HE'S NOT AN EMPLOYEE OF THE FIRM, YOUR
25 HONOR. HE IS THE INVESTOR IN SIX4THREE. HE'S A YALE LAW
26 SCHOOL GRADUATE. HE HAS PASSED THE CALIFORNIA BAR I

1 UNDERSTAND, BUT HE HAS NOT BEEN ADMITTED YET. BUT HE HAS BEEN
2 WORKING WITH OUR FIRM IN THE CAPACITY OF A LAW CLERK. IT IS
3 MY UNDERSTANDING, YOUR HONOR, THAT HE IS CURRENTLY IN
4 NEW YORK. AND SO TO THE EXTENT THERE ARE ANY ORDERS REGARDING
5 HIS LAPTOP, IT'S GOING TO -- WE'RE GOING TO HAVE TO FIGURE OUT
6 HOW TO COMPLY WITH THEM PROMPTLY.

7 THE COURT: YES. PLEASE HOLD YOUR THOUGHT. I'VE
8 GOT A SIGNAL FROM MY COURT REPORTER WE'VE BEEN ON THE RECORD
9 QUITE A WHILE AND THERE'S BEEN VIGOROUS DISCUSSION ON THE
10 RECORD. WE'RE GOING TO TAKE ABOUT A 20-MINUTE BREAK FOR THE
11 COURT REPORTER. AND WE WILL RECONVENE AT 3:35. COURT IS IN
12 RECESS UNTIL 3:35. THANK YOU VERY MUCH, EVERYONE.

13 (WHEREUPON, A RECESS WAS TAKEN.)

14 THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD.
15 THE RECORD SHALL REFLECT ALL COUNSEL ARE PRESENT AT THE
16 COUNSEL TABLE. THE PLAINTIFF'S PRINCIPAL IS ALSO PRESENT WITH
17 HIS INDEPENDENT COUNSEL. WE WERE IN THE MIDST OF THE
18 PRESENTATION OF ARGUMENT BY THE PLAINTIFF MR. GODKIN AND
19 MR. GROSS. DO YOU HAVE ANYTHING FURTHER TO ARGUE AT THIS
20 TIME, SIR?

21 MR. GODKIN: THE ONLY POINT, YOUR HONOR, IS YOU
22 ASKED ABOUT WHERE THE THUMB-DRIVE IS OR MAYBE MS. MEHTA ASKED.

23 THE COURT: YES. WHERE IS THE THUMB-DRIVE?

24 MR. GODKIN: IT WAS SIMPLY A -- MR. KRAMER HAD A
25 NUMBER OF PERSONAL THUMB DRIVES IN HIS BACKPACK.

26 THE COURT: YES.

1 MR. GODKIN: HE WENT OUT AND HE GAVE IT TO
2 MR. COLLINS. AND WHAT MR. COLLINS DID WITH IT WE DON'T KNOW.
3 IT'S STILL IN HIS POSSESSION, AS FAR AS WE KNOW.

4 THE COURT: THAT THUMB-DRIVE WAS THE VEHICLE TO
5 TRANSMIT THE DOCUMENTS IN QUESTION, CORRECT?

6 MR. GODKIN: THAT'S WHAT I UNDERSTAND.

7 THE COURT: ALL RIGHT. IS THERE ANYTHING FURTHER?

8 MR. GODKIN: NO. THANK YOU, YOUR HONOR.

9 THE COURT: ALL RIGHT. MS. MEHTA.

10 MS. MEHTA: THANK YOU, YOUR HONOR. MY COLLEAGUE
11 MR. LERNER IS GOING TO ADDRESS THE ISSUES THAT CAME UP WITH
12 MR. GODKIN'S PRESENTATION WITH YOUR HONOR'S INDULGENCE.

13 THE COURT: ALL RIGHT. MR. LERNER.

14 MR. LERNER: THANK YOU, YOUR HONOR. I FIND MYSELF
15 IN THE UNUSUAL POSITION OF STARTING BY ANSWERING THE QUESTIONS
16 THAT YOU ASKED OPPOSING COUNSEL BECAUSE I THINK THAT WE CAN
17 ACTUALLY ANSWER THEM MORE HONESTLY AND ACCURATELY. BEFORE I
18 DO THAT, I WOULD LIKE TO EMPHASIZE THAT YOUR HONOR'S PUTTING
19 PEOPLE UNDER OATH SEEMS TO HAVE SHED SOME LIGHT ON THINGS IN
20 THE PAST. AND I CONTINUE TO THINK IT WILL CONTINUE TO DO SO
21 TODAY. I WILL OF COURSE FOLLOW YOUR LEAD. BUT IF AFTER WE'RE
22 FINISHED WITH THIS SECTION OF THE ARGUMENT, THERE ARE ANY
23 OUTSTANDING QUESTIONS WHICH I THINK THERE WILL BE FOR OPPOSING
24 COUNSEL, WE WOULD AGAIN SUGGEST THAT SOME OF THOSE SHOULD BE
25 UNDER OATH.

26 SO YOUR FIRST QUESTION IS REALLY WHAT HAPPENED WITH

1 THESE DOCUMENTS? WHY DID THEY END UP ON THE DROPBOX THAT
2 MR. KRAMER HAD ACCESS TO? AND AS YOU NOTED DIDN'T GET A
3 STRAIGHTFORWARD ANSWER. THE VERY STRAIGHTFORWARD ANSWER
4 IS THAT SIX4THREE'S LEGAL TEAM GAVE THOSE DOCUMENTS TO
5 DR. KRAMER -- TO MR. KRAMER. IF THE LEGAL TEAM HAD NOT
6 BREACHED THE PROTECTIVE ORDER ENTERED BY THIS COURT,
7 MR. KRAMER NEVER COULD HAVE DONE WHAT HE DID. HE COULDN'T
8 HAVE VIOLATED THE PROTECTIVE ORDER. AND HE COULDN'T HAVE GONE
9 ON TO VIOLATE YOUR HONOR'S ORDER OF NOVEMBER 20TH. WE ARE
10 HERE BECAUSE OF THE SIX4THREE LEGAL TEAM'S DECISION TO PUT
11 THOSE DOCUMENTS ON THAT DROPBOX.

12 NOW, LET'S TALK ABOUT THE SIX4THREE LEGAL TEAM AND
13 WHAT YOU HAVEN'T BEEN TOLD. YOU RECEIVED THE LETTER ON
14 NOVEMBER 29TH, WHICH YOU MENTIONED WHICH SAYS, "ON THE MORNING
15 OF NOVEMBER 20TH, 2018, WE FURTHER DISCOVERED THAT A MEMBER OF
16 SIX4THREE'S LEGAL TEAM THOMAS SCARAMELLINO HAD PREVIOUSLY
17 PLACED UNREDACTED DOCUMENTS IN THIS FOLDER."

18 MR. SCARAMELLINO IS, AS DISCUSSED, A THIRD PARTY
19 INVESTOR WHO IS NOT A LAWYER. HE'S COME UP IN THIS CASE
20 BEFORE BECAUSE WHEN WE FOUND OUT ABOUT HIM, WE SAID, "WHY ARE
21 OUR DOCUMENTS BEING SHARED WITH A NONPARTY NONLAWYER?" WHEN
22 WE RAISED THAT, SUDDENLY HE BECAME PART OF THE LEGAL TEAM. WE
23 NEVER HEARD THAT BEFORE. WE NEVER SEEN ANYTHING TO SUGGEST
24 THAT HE WAS A MEMBER OF THEIR LEGAL TEAM. BUT WHEN WE SAID,
25 "LET'S SEE THE COMMUNICATIONS WITH HIM," SUDDENLY HE BECAME A
26 MEMBER OF HIS LEGAL TEAM.

1 NOW, HE DIDN'T JUST BECOME A MEMBER OF THE LEGAL
2 TEAM. IN ORDER TO PRESERVE PRIVILEGE OVER COMMUNICATIONS WITH
3 MR. SCARAMELLINO, MR. GODKIN FILED A DECLARATION IN THIS COURT
4 SIGNED UNDER PENALTY OF PERJURY. AND IN THAT DECLARATION, HE
5 SAID THE FOLLOWING. "MR. SCARAMELLINO HAS BEEN WORKING WITH
6 ME AND MY FIRM AS A MEMBER OF THE LEGAL TEAM SINCE MY FIRM WAS
7 RETAINED BY SIX4THREE WITH SIX4THREE'S FULL KNOWLEDGE AND
8 APPROVAL. MR. SCARAMELLINO IS PERFORMING LEGAL RESEARCH, FACT
9 INVESTIGATION, ASSEMBLY OF DATA AND INFORMATION AND
10 PREPARATION OF PLEADINGS AND ANY OTHER WORK THAT I DECIDE WILL
11 ASSIST ME AND MY FIRM IN CARRYING OUT THE REPRESENTATION OF
12 SIX4THREE.

13 ALL OF THE TASKS PERFORMED BY MR. SCARAMELLINO ARE
14 PERFORMED AT MY DIRECTION AND UNDER MY SUPERVISION. ALL OF
15 THE WORK PERFORMED BY MR. SCARAMELLINO HAS BEEN REVIEWED BY ME
16 OR ANOTHER ATTORNEY AT MY FIRM AND MERGED INTO MY FIRM'S WORK
17 PRODUCT."

18 SO THE ANSWER TO YOUR HONOR'S QUESTION AS TO WHAT
19 HAPPENED HERE IS THAT SIX4THREE'S LEGAL TEAM INCLUDING
20 MR. SCARAMELLINO GAVE MR. KRAMER ACCESS TO THESE DOCUMENTS
21 FULL STOP AND THAT'S WHY WE'RE HERE.

22 YOU ALSO ASKED A SET OF QUESTIONS ABOUT THE
23 DESTRUCTION OF DOCUMENTS. I ALREADY ADDRESSED WHAT WE ALL
24 KNOW WHICH IS LAWYERS PARTICULARLY IN THIS STATE ARE FAMILIAR
25 WITH THE TECHNOLOGY THAT HAS BEEN AROUND FOR QUITE A WHILE
26 ENOUGH TO KNOW THAT YOU DON'T SAY "DESTROY IT." YOU SAY "TAKE

1 AN IMAGE AND THEN WE WILL FIGURE IT OUT." WE COVERED THAT.

2 MR. GODKIN WILL NOT -- FROM THIS STATE IS ALSO AWARE
3 OF THIS. HIS OWN WEBSITE UNDER HIS NAME FOR DIRECTIONS FOR
4 PEOPLE TELLS GENERAL COUNSEL THAT THE GOLD STANDARD IS THE
5 SYSTEM WIDE MERE IMAGE BACK-UP, SO IT'S NOT A SECRET TO HIM
6 EITHER. YOU DON'T TELL PEOPLE TO DELETE STUFF. SO THAT THEN
7 GETS US TO THE IDEA THAT YOU'VE HEARD UNDER OATH IN SOME OF
8 THESE DECLARATIONS THAT THEY DON'T THINK ANY DOCUMENTS WERE
9 DESTROYED OR EVIDENCE WERE DESTROYED.

10 OF COURSE WE CAN'T KNOW THAT, AS YOUR HONOR POINTED
11 OUT. BUT IT'S ALSO DEMONSTRABLY INCORRECT THAT WHEN YOU
12 DELETE DOCUMENTS NOTHING IS LOST. THERE WILL BE THE LOSS OF
13 INFORMATION, THE METADATA FROM THOSE DOCUMENTS. THERE WILL IN
14 ALL LIKELIHOOD BE INFORMATION LOST. AND THAT WAS DONE AT
15 COUNSEL'S DIRECTION.

16 I THINK IT IS TROUBLING THAT THE EXPLANATION YOU
17 HEARD WAS VERY SIMILAR TO THE EXPLANATION THAT MR. KRAMER
18 PROVIDED. MR. COUNSEL -- MR. GROSS SAID, "I SUDDENLY FOUND
19 MYSELF IN AN IMPOSSIBLE POSITION, SO I DID IT." IT'S A LOT
20 LIKE MR. KRAMER'S, "I PANICKED AND I DID IT."

21 ALL OF THIS IS TURNING OUT TO BE UNFORTUNATELY A
22 FLAWED EXPLANATION FOR WHY THESE DOCUMENTS ENDED UP IN
23 MR. KRAMER'S POSSESSION AND HE THEN DISCLOSED THEM WHEN THE
24 ANSWER IS VERY CLEAR. THEIR LEGAL TEAM GAVE THEM TO
25 MR. KRAMER AND THEN MR. KRAMER DISCLOSED THEM. AS FOR NOT
26 KNOWING ABOUT THIS PREVIOUSLY, THAT'S CONTRARY TO THE

1 DOCUMENTS THAT HAVE BEEN SUBMITTED TO YOUR HONOR ALREADY.

2 YOU CAN SEE THAT FROM THE DOCUMENTS THAT ARE ALREADY
3 IN FRONT OF YOU. THEY SAY, "OH, WE ONLY LEARNED OF THIS JUST
4 THIS PAST WEEK." THEY SAY THAT WE DIDN'T KNOW THAT MR. KRAMER
5 WAS AWARE OF ANY OF THESE DOCUMENTS UNTIL THE 19TH. WELL, WE
6 CAN TELL FROM MR. KRAMER'S OWN EMAILS ATTACHED TO HIS
7 DECLARATION THAT HE WAS ALREADY SAYING IN MAY OF 2018 THAT
8 THESE DOCUMENTS WERE QUOTE "STORED ON A FILE SERVER IN THE
9 CLOUD." KRAMER DECLARATION PARAGRAPH 3.

10 WE ALREADY KNOW THAT HE TOLD SOMEONE WORKING FOR THE
11 COMMITTEE, "I CAN CONFIRM THAT YOUR DESCRIPTION OF THE
12 DOCUMENTS IN MY POSSESSION IS ACCURATE." NOT ONLY THAT, BUT
13 HE WENT ON TO SAY, "I THINK THEY'D BE HIGHLY RELEVANT TO YOUR
14 INVESTIGATION."

15 NOTABLY COUNSEL IS NOT SAYING HE NEVER HAS SAID THAT
16 THE LEGAL TEAM WAS UNAWARE OF THESE COMMUNICATIONS OR DIDN'T
17 KNOW ANYTHING ABOUT THEM. AND TELLINGLY MR. SCARAMELLINO
18 ISN'T HERE. SO, AGAIN, WHAT YOU SEE IS A SET OF DOCUMENTS
19 THAT WERE SHARED WITH MR. KRAMER IN VIOLATION OF THE
20 PROTECTIVE ORDER. AND A SET OF DOCUMENTS, BY THE WAY, WAS PUT
21 AT ISSUE IN THIS CASE BY MR. GODKIN. SO HE CREATES A
22 DECLARATION WITH HUNDREDS OF PAGES OF EXHIBITS. MANY OF WHICH
23 YOUR HONOR HAVING GONE THROUGH THEM IN CAREFUL DETAIL POINTED
24 OUT DIDN'T HAVE ANYTHING TO DO WITH WHAT WE'RE TALKING ABOUT.

25 BUT SOMEHOW FOR SOME REASON THEY WERE ATTACHED TO
26 HIS DECLARATION. AND THEN LOW AND BEHOLD, THAT DECLARATION

1 THAT THE ATTORNEYS DRAFTED WITH DOCUMENTS THAT DIDN'T HAVE
2 ANYTHING TO DO WITH THIS CASE IS DESCRIBED IN CAREFUL DETAIL
3 BY MR. KRAMER FOR THIRD PARTIES. AND MR. KRAMER INITIALLY
4 INVITES THEM TO SERVE A SUBPOENA IN CALIFORNIA THAT SAYS, "BY
5 THE WAY IF YOU DO THAT, I'LL BE SUBJECT TO THE POWER OF THE
6 CALIFORNIA COURT."

7 AND THEN WHEN YOU ASK MR. KRAMER ARE YOU TELLING THE
8 TRUTH ABOUT EVERYTHING IN YOUR DECLARATION TODAY, IT'S ALSO
9 WORTH NOTING THAT WHILE MR. KRAMER'S DECLARATION SAYS, YEAH,
10 WHEN THE COMMITTEE CONTACTED ME I SAID UNEQUIVOCALLY, NO, I
11 CAN'T DO THAT. IN FACT, WHAT HIS DECLARATION SHOWS IN THE
12 EMAILS THAT ARE ATTACHED IS WHAT HE TOLD THEM IS I CAN'T
13 VOLUNTARILY DO THAT.

14 AND LOW AND BEHOLD HE GETS SERVED WITH AN ORDER FOR
15 THE DECLARATION THAT COUNSEL CREATED WITH DOCUMENTS THAT HAVE
16 NOTHING TO DO WITH THIS CASE. AND IT ALL GETS DISCLOSED WHEN
17 HE DECIDES TO WALK OVER TO PARLIAMENT WITH A COMPUTER THAT IN
18 A SOMEWHAT DISTURBING PATTERN OF DEFERENCE TO AND RESPECT FOR
19 THIS COURT, DOESN'T GET BROUGHT HERE TODAY.

20 HE CAN VOLUNTARILY BRING IT TO PARLIAMENT WHEN HE
21 THINKS HE'S GOING TO WALK IN AND MIRACULOUSLY COLD-CALL A
22 MEMBER OF PARLIAMENT AND GET THEM TO AGREE WITH THEM WITH A
23 THUMB-DRIVE. BUT WHEN YOUR HONOR SCHEDULES A HEARING, THE
24 COMPUTER ISN'T HERE.

25 SO THAT ALL LEADS TO THE ARGUMENT ON THE LAWYERS.
26 TO BE VERY CLEAR, THERE IS NOT A PRIVILEGED ISSUE. I DON'T

1 WANT TO TALK WITH THEM ABOUT THEIR PRIVILEGED COMMUNICATIONS.
2 ALL I NEED IS THREE HOURS WITH BOTH OF THESE GENTLEMEN TO
3 COVER THE ISSUES THAT THEY HAVE PUT IN FRONT OF YOUR HONOR.
4 THEY HAVE SUBMITTED DECLARATIONS TO YOU WITH EXHIBITS AND
5 THEY'VE SUBMITTED LETTERS TO YOU.

6 WE CAN ASK THEM ABOUT THAT INFORMATION AND NATURALLY
7 THE INFORMATION THEY OMITTED. FOR EXAMPLE, YOU HEARD, I
8 HAVEN'T HAD ANY CONTACT WITH THE COMMITTEE. THERE ARE NO
9 DOCUMENTS SHOWING CONTACT WITH THE COMMITTEE. WHAT IF WE
10 ASKED MR. GODKIN TODAY DID MR. SCARAMELLINO OF YOUR LEGAL TEAM
11 WHO DOES EVERYTHING UNDER YOUR SUPERVISION AT YOUR DIRECTION?
12 DID HE HAVE CONTACT WITH THE COMMITTEE? DID MR. SCARAMELLINO
13 HAVE CONTACT WITH ANY THIRD PARTIES LIKE MEMBERS OF THE MEDIA?

14 THOSE ARE NOT PRIVILEGED QUESTIONS. THOSE ARE ABOUT
15 THE DISCLOSURE OF THIS INFORMATION IN VIOLATION OF YOUR
16 HONOR'S ORDERS TO THIRD PARTIES. THAT CAN BE COVERED IN THREE
17 HOURS. AND BY THE WAY, IF THEY ARE WORRIED ABOUT THE
18 PRIVILEGE, THEN WE ARE PERFECTLY HAPPY TO PROPOSE JUDGE KRAMER
19 OR OTHER FORMER STATE COURT JUDGES FROM THIS AREA WHO ARE NOW
20 WORKING AS REFEREES. THEY CAN SIT THERE. YOUR HONOR COULD
21 APPOINT THEM RIGHT NOW WITHOUT ANY BRIEFING OR ANYTHING ELSE
22 UNDER THE CIVIL CODE. THEY COULD HEAR ANY DISPUTES DURING
23 THOSE DEPOSITIONS.

24 WITH RESPECT TO THE DOCUMENTS, WE CAN AND SHOULD
25 FOLLOW EXACTLY THE SAME PROCESS THAT WE ARE FOLLOWING FOR
26 MR. KRAMER AND MR. SCARAMELLINO. WHY? WE SHOULD FOLLOW IT

1 FOR A COUPLE OF REASONS. FIRST OF ALL, AS MR. GODKIN ADVISES
2 PEOPLE, IT'S THE WAY YOU DO THIS. SECOND, WE'RE NOT ASKING TO
3 SEE IT RIGHT NOW. ALL WE WANT TO DO IS HAVE IT PRESERVED.
4 AND THE REASON THAT'S SO IMPORTANT IS THEY CAN'T EVEN ANSWER
5 YOUR QUESTIONS IN THIS COURT TODAY ABOUT WHERE THIS
6 INFORMATION IS CURRENTLY. WHAT'S HAPPENING WITH IT. WHAT THE
7 PROBLEMS ARE. IF THEIR COMPUTERS ARE NOT IMAGED, THERE ARE NO
8 GUARANTEES ABOUT THE PRESERVATION OF THAT INFORMATION. AND
9 IMPORTANTLY WITH RESPECT TO PEOPLE'S MEMORIES, I GUARANTEE IF
10 A WEEK OR TWO GOES BY, PEOPLE ARE GOING TO START SAYING I
11 CAN'T REMEMBER. I'M SORRY I CAN'T RECALL WHAT
12 MR. SCARAMELLINO WAS DOING.

13 THOSE COMPUTERS NEED TO BE IMAGED. IT'S NOT THE
14 SAME AS SAYING GIVE THEM TO ME, JOSH LERNER. IT IS SAYING AS
15 A MATTER OF BASIC DOCUMENT PRESERVATION, LETS IMAGE THEM JUST
16 AS YOU ADVISE PEOPLE SHOULD BE DONE IN LITIGATION. THEN THEY
17 CAN HOLD TIGHT AND PEOPLE DON'T NEED TO WORRY ABOUT IT, BUT
18 THAT SHOULD BE DONE.

19 WITH RESPECT TO THE DOCUMENTS THAT WE'VE BEEN
20 TALKING ABOUT, I WANT TO START WITH THE DOCUMENTS ATTACHED TO
21 MR. KRAMER'S DECLARATION WHICH YOU ASKED HIM ABOUT.
22 MR. KRAMER SENT AN EMAIL THAT HAS THREE ATTACHMENTS. IF YOU
23 LOOK AT EXHIBIT 1 TO MR. KRAMER'S DECLARATION, YOU CAN SEE
24 THREE ATTACHMENTS.

25 THE COURT: ICONS FOR ATTACHMENTS.

26 MR. LERNER: CORRECT. HE SAYS IN HIS EMAIL THAT

1 HE'S ATTACHING THEM FOR MR. COLLINS REVIEW.

2 THE COURT: YES.

3 MR. LERNER: WE HAVE ASKED FOR THOSE ATTACHMENTS.
4 AND AS YOU HEARD OPPOSING COUNSEL SAY "WE'LL PRODUCE THEM
5 EVENTUALLY."

6 THE COURT: THERE'S NO EVENTUALITY ABOUT IT.

7 MR. LERNER: RIGHT. I DON'T KNOW HOW IT IS POSSIBLE
8 THAT WE ARE SITTING HERE RIGHT NOW WITHOUT THOSE DOCUMENTS.
9 BECAUSE WITHOUT THEM, IT'S IMPOSSIBLE FOR EXAMPLE FOR
10 MR. KRAMER OR ANYBODY ELSE TO TELL YOU THAT HIS DECLARATION IS
11 ACCURATE.

12 THE COURT: YOU KNOW, I'VE BEEN VERY PATIENT OVER
13 THE PAST FEW WEEKS AND THE PAST FEW DAYS WITH REGARD TO THESE
14 MATTERS. I MUST SAY, HOWEVER, WHAT HAS HAPPENED IS
15 UNCONSCIONABLE. IT SHOCKS THE CONSCIENCE. AND YOUR CONDUCT
16 IS NOT WELL TAKEN BY THIS COURT.

17 IT'S ONE THING TO SERVE OTHER NEEDS THAT ARE OUTSIDE
18 THE SCOPE OF THIS LAWSUIT, BUT YOU DON'T SERVE THOSE NEEDS OR
19 SATISFY THE CURIOSITIES OF INQUIRING PARTIES WHEN THERE'S A
20 COURT ORDER PREVENTING YOU TO DO SO.

21 IT IS RATHER CURIOUS THAT THE SAME LAPTOP THAT WAS
22 USED TO DOWNLOAD ONTO A THUMB-DRIVE CONFIDENTIAL INFORMATION
23 SUBJECT TO THE PROTECTIVE ORDERS OF MY SUBSEQUENT ORDERS TO
24 SEAL IS NOT AVAILABLE IN THIS COURT TODAY. IT WAS AVAILABLE
25 TO THE HOUSE OF COMMONS DCMS BUT NOT TO ME.

26 AND THERE IS NO EXCUSE TO HAVE A LAPTOP AVAILABLE TO

1 A SUBCOMMITTEE OF THE HOUSE OF COMMONS INQUIRING ON MATTERS
2 THAT ARE NOT WITHIN THE FOUR CORNERS OF THIS LAWSUIT AND YET
3 MAKE IT UNAVAILABLE TO THIS COURT WHEN YOU HAVE A HEARING
4 TODAY AT 2:00 O'CLOCK WHICH I DULY NOTICED BY THE ORDERS THAT
5 I ISSUED.

6 MR. LERNER, YOU MAY CONTINUE.

7 MR. LERNER: I THINK YOUR HONOR PUT IT BETTER THAN I
8 COULD HAVE. AND I WANT TO CLOSE WITH THE FOLLOWING ON THIS
9 TOPIC. WE ARE ASKING FOR THE TWO LIMITED DEPOSITIONS I JUST
10 DESCRIBED AND FOR FORENSIC IMAGES THAT JUST PRESERVE
11 INFORMATION. WHY IS THAT SO IMPORTANT? IF I CAN HUMBLY SPEAK
12 ON BEHALF OF LAWYERS IN THIS STATE, I HAVE LOOKED LONG AND
13 HARD FOR NOT JUST THE CASE IN THIS STATE BUT A CASE ANYWHERE
14 THAT INVOLVES SOMETHING LIKE THIS, AND I CAN'T FIND ONE. I
15 HAVE FOUND SITUATIONS IN WHICH COUNSEL DISCLOSED THE PROFITS
16 OF A COMPANY IN VIOLATION OF A PROTECTIVE ORDER AND THERE WERE
17 SERIOUS CONSEQUENCES. I HAVE FOUND SITUATIONS IN WHICH
18 INFORMATION WAS DISCLOSED TO EXPERTS, BUT NOT IN A WAY THAT IT
19 SAW THE LIGHT OF DAY AND THERE WERE SERIOUS CONSEQUENCES.

20 IF THERE ARE NOT CONSEQUENCES HERE, THE TRUST THAT
21 HAS BEEN ESTABLISHED OVER THE COURSE OF MY ENTIRE CAREER AND
22 PEOPLE LONG BEFORE ME THAT ENABLES ME TO TELL MY CLIENTS AND
23 ENABLES MY OPPOSING COUNSEL TO TELL THEIR CLIENTS, I
24 UNDERSTAND YOUR ENGINEERS ARE TERRIFIED ABOUT PRODUCING THIS
25 INFORMATION. I UNDERSTAND YOUR EXECUTIVES, OF COURSE, HAVE TO
26 HAVE GROWN UP DISCUSSIONS AMONGST THEMSELVES WHERE THEY ARE

1 ABLE TO DELIBERATE HONESTLY AND OPENLY AND HAVE A MARKETING
2 PLACE OF IDEAS.

3 I UNDERSTAND YOU'RE WORRIED THAT ALL THAT COULD SEE
4 THE LIGHT OF DAY, BUT NO JUDGE HAS EVER LET THAT HAPPEN. NO
5 LAWYER HAS EVER JUST GONE OUT AND PRODUCED ALL OF IT. THAT'S
6 WHAT WE ALWAYS SAY IN ORDER TO MAKE PEOPLE COMFORTABLE WITH
7 DOCUMENT PRODUCTIONS THAT THIS COURT AND OTHER COURTS NEED IN
8 ORDER TO RULE ON CASES.

9 I CAN'T SAY THAT ANYMORE. NEITHER CAN THEY. AS A
10 RESULT OF WHAT HAPPENED HERE, LAWYERS CAN NO LONGER SAY --
11 IT'S NEVER HAPPENED. PEOPLE DON'T GO OUT AND PRODUCE HUNDREDS
12 OF DOCUMENTS TO FOREIGN GOVERNMENT. WE CAN'T SAY JUDGES
13 PROTECT THIS CONDUCT. THIS HAPPENED IN OPEN DEFIANCE OF YOUR
14 HONOR'S ORDERS.

15 THE COURT: THE ENDS DO NOT JUSTIFY THE MEANS.
16 WHATEVER YOU'RE TRYING TO ACCOMPLISH, THE ENDS DO NOT JUSTIFY
17 THE MEANS. PARTICULARLY WHEN MY ORDERS ARE VIOLATED IN
18 RELATION TO THIS CASE.

19 ONE ORDER I'M GOING TO MAKE RIGHT NOW, MR. GODKIN
20 AND MR. GROSS, THE GROSS & KLEIN FIRM AND THE BIRNBAUM &
21 GODKIN FIRM AND COUNSEL STUART GROSS, DAVID S. GODKIN AND
22 JAMES KRUEZER SHALL REMAIN IN THIS CASE AND SHALL NOT WITHDRAW
23 FROM REPRESENTATION OF PLAINTIFF UNTIL THE MATTERS IN RELATION
24 TO THE DISTRIBUTION OF THOSE CONFIDENTIAL DOCUMENTS IS
25 RESOLVED. YOU'RE NOT GOING ANYWHERE. AND YOU ARE ORDERED TO
26 REMAIN IN THIS CASE.

1 MR. GODKIN: WE'VE ALWAYS HAD EVERY INTENTION OF
2 DOING SO FOR THE PURPOSE OF RESOLVING THESE ISSUES, YOUR
3 HONOR.

4 THE COURT: THAT IS ONE OF THE ORDERS OF THIS COURT.
5 MR. KRAMER'S LAPTOP SHALL BE SURRENDERED TO THE FORENSIC
6 EXAMINER. AND I'M GOING TO HAVE MORE DETAILED INSTRUCTIONS IN
7 MY ORDER. BUT THAT FORENSIC EXAMINER WILL BE ORDERED NOT TO
8 DISCLOSE ANY FINDINGS OR EVIDENCE TO EITHER PARTY UNTIL
9 FURTHER ORDER OF THE COURT.

10 SINCE THE PARTIES HAVE AGREED TO STROZ FRIEDBERG,
11 MS. MEHTA IS ATTEMPTING TO OBTAIN THE ADDRESS FOR THE DELIVERY
12 OF THE LAPTOP. AND WE NEED THAT ADDRESS SO THAT I CAN PREPARE
13 MY ORDER. AND MIND YOU, EVERYONE, YOU'RE GOING TO REMAIN IN
14 THE COURTROOM UNTIL MY ORDER IS FINISHED. AND IT'S GOING TO
15 TAKE A FEW MOMENTS TO COMPLETE THIS ORDER THAT I MAKE RULING
16 ON THE EX PARTE APPLICATION THAT FACEBOOK HAS MADE AS WELL AS
17 THE OTHER MATTERS THAT ARE RELATED TO THE PROCEEDINGS TODAY.

18 MS. MEHTA: YOUR HONOR, I CAN DO IT NOW OR I CAN DO
19 IT LATER. I WANTED TO ADDRESS THE LOGISTICS OF THE DELIVERY
20 OF THE LAPTOP --

21 THE COURT: YES.

22 MS. MEHTA: -- TO STROZ FRIEDBERG. SO
23 STROZ FRIEDBERG HAS PEOPLE ON THE GROUND HERE IN
24 SAN FRANCISCO. THEY ALSO HAVE PEOPLE ON THE GROUND IN
25 NEW YORK IN THE EVENT THAT YOUR HONOR WERE TO ORDER
26 MR. SCARAMELLINO'S LAPTOP BE IMAGED. AND ALSO BOSTON IN THE

1 EVENT THAT WE NEED BIRNBAUM AND GODKIN'S INFORMATION TO BE
2 IMAGED FOR PRESERVATION PURPOSES.

3 THEY CAN HAVE PEOPLE AT MR. KRAMER'S WHATEVER
4 LOCATION MR. KRAMER'S LAPTOP IS AT AT MR. SCARAMELLINO'S
5 LOCATION FOR HIS LAPTOP AND THE BIRNBAUM & GODKIN LAW FIRM AND
6 ALL THE RELEVANT PLACES TONIGHT TO PICK UP THE DRIVES.

7 THE COURT: WHERE?

8 MS. MEHTA: SO WHAT WE WOULD NEED IS THE ADDRESSES
9 FROM SIX4THREE AND FOR MR. KRAMER AND FOR MR. SCARAMELLINO AS
10 TO WHERE THE RELEVANT DEVICES FOR MR. KRAMER, MR. SCARAMELLINO
11 AND COUNSEL ARE. AND THEN THE INDEPENDENT FIRM STROZ
12 FRIEDBERG WILL HAVE SOMEONE GO AND PICK THEM UP.

13 THE COURT: OKAY. WHAT'S THE TIMEFRAME IN PICKING
14 THESE UP?

15 MS. MEHTA: THEY CAN DO IT TONIGHT.

16 THE COURT: WELL, THEY CAN DO IT TONIGHT BUT WHEN
17 TONIGHT?

18 MS. MEHTA: I THINK WE COULD HAVE IT WITHIN A FEW
19 HOURS, YOUR HONOR. CERTAINLY BY 8:00 P.M.

20 THE COURT: WELL, WHAT I SUGGEST IS THAT
21 MR. SCARAMELLINO AND MR. KRAMER HAVE COUNSEL PRESENT WHEN
22 THESE LAPTOPS ARE HANDED OVER. IN OTHER WORDS, I DON'T WANT
23 IT HANDED OVER WITHOUT THE SUPERVISION OF COUNSEL. ALL RIGHT?

24 MS. MEHTA: UNDERSTOOD.

25 THE COURT: EACH COUNSEL ARE OFFICERS OF THE COURT.
26 AND THEY ARE HELD IN THE HIGHEST REGARD. AT LEAST WITH REGARD

1 TO THIS COURT, THE EXPECTATIONS ARE HIGH BECAUSE THEY ARE
2 MEMBERS OF THE BAR. AND THEIR SUPERVISION OF THE CLIENT
3 SHOULD BE DONE WHEN THE LAPTOPS ARE TURNED OVER TO THE
4 FORENSIC EXAMINERS. SO LOGISTICALLY HOW DO WE MAKE THAT
5 HAPPEN?

6 MS. MEHTA: SO, YOUR HONOR, WITH RESPECT TO
7 MR. KRAMER, THAT SHOULD BE EASY. MR. KRAMER IS HERE. HE
8 LIVES HERE. PRESUMABLY THE LAPTOP IS SOMEWHERE IN THE
9 BAY AREA. HE HAS COUNSEL WITH HIM TODAY, SO THEY SHOULD BE
10 ABLE TO ATTEND ANY INSPECTION.

11 THE COURT: ALL RIGHT. HOW ABOUT HAVING EVERYONE
12 CONGREGATE AT MR. GROSS'S FIRM. AND THEN HAVING THE FORENSIC
13 EXAMINER MEET EVERYONE AT MR. GROSS'S FIRM.

14 MS. MEHTA: THAT'S NO PROBLEM, YOUR HONOR.

15 THE COURT: IT WOULD BE PROFICUOUS TO HAVE EVERYONE
16 IN ONE PLACE SO THAT THERE'S ONE STOP BY YOUR FORENSIC
17 EXAMINERS.

18 MS. MEHTA: THE ISSUE IS MR. SCARAMELLINO WHO I TAKE
19 IS NOT IN CALIFORNIA EVEN THOUGH HE HAS A BUSINESS HERE, I
20 THINK HE'S CURRENTLY IN NEW YORK. WE CAN HAVE THE INDEPENDENT
21 FIRM GO AND HAVE SOMEONE PICK UP THE DEVICES OR IMAGE THE
22 DEVICES FOR MR. SCARAMELLINO. OBVIOUSLY GETTING COUNSEL THERE
23 BY TONIGHT IS GOING TO BE DIFFICULT SINCE EVERYONE IS HERE.

24 AND I ALSO THINK GIVEN HIS ROLE AT THE VERY HEART OF
25 ALL OF THIS, THAT DELAYING THE COLLECTION OF HIS DATA AND
26 IMAGE IS A RISK THAT WE OUGHT NOT TAKE. AND SO THE QUESTION

1 IS WHETHER YOUR HONOR WOULD PERMIT THE COLLECTION OF
2 MR. SCARAMELLINO'S IMAGE DATA BY THE INDEPENDENT FIRM.
3 IRRESPECTIVE OF THE PRESENCE OF COUNSEL, HE WAS FUNCTIONING
4 UNDER A LEGAL TEAM SO PRESUMABLY HE'S IN A QUASI LEGAL
5 CAPACITY ANYWAY GIVEN WHAT THEY'VE DONE. THAT ONE I THINK
6 NEEDS TO HAPPEN TONIGHT. I DON'T KNOW THAT WE'RE GOING TO GET
7 EVERYONE THERE TONIGHT.

8 THE COURT: I HAVEN'T MADE A DECISION ON
9 MR. SCARAMELLINO'S LAPTOP IN ANY EVENT. AND I'M GOING TO HAVE
10 TO THINK ABOUT THAT AS I DRAFT THE REMAINDER OF THE ORDER. IS
11 THERE ANYTHING FURTHER? MR. GODKIN, DID YOU HAVE ANY
12 RESPONSES TO MR. LERNER'S ARGUMENTS?

13 MR. GODKIN: YOUR HONOR, MR. LERNER'S ARGUMENT ABOUT
14 MAKING AN IMAGE OF MR. KRAMER'S LAPTOP WHILE HE WAS IN THE
15 U.K. LAST WEEK, THE WHOLE PROBLEM WAS HE -- WE LEARNED HE WAS
16 THERE. HE WAS THERE BY HIMSELF. WE WERE NOT THERE. IT WAS
17 NOT POSSIBLE TO MAKE AN IMAGE OF HIS COMPUTER LAST WEEK, SO I
18 UNDERSTAND THAT YOU MAY THINK THAT WHAT WE DID WAS NOT ENOUGH
19 OR WAS WRONG. BUT OUR INTENT WAS IN GOOD FAITH TO DO WHAT WE
20 COULD TO TRY TO AVOID THIS PROBLEM.

21 THE COURT: ALL RIGHT. THANK YOU.

22 MR. THOREEN: IF I MAY BRIEFLY?

23 THE COURT: YES.

24 MR. THOREEN: JUST VERY BRIEFLY. I WON'T BELABOR
25 THE POINT BECAUSE MR. KRAMER LEARNED YESTERDAY MORNING THAT
26 HIS COUNSEL FOR PLAINTIFFS IN THIS CASE COULDN'T REPRESENT HIM

1 IN THIS MATTER, SO I'VE BEEN ON BOARD FOR ABOUT 21 HOURS.

2 ONE THING THAT I DID WANT TO LET THE COURT KNOW THAT
3 IN THE LAST 24 HOURS, WE'VE ENGAGED DC INTERNATIONAL LAW FIRM
4 WHICH IS GOING TO UNDERTAKE WHATEVER EFFORTS IT CAN UNDER
5 BRITISH LAW TO EITHER OBTAIN THE DOCUMENTS THAT WERE PROVIDED
6 TO THE COMMITTEE OR TO AT LEAST SECURE AGREEMENT THAT THEY
7 WILL NOT BE RELEASED IN ANY FASHION.

8 THE COURT: I CERTAINLY HOPE THAT THOSE DOCUMENTS
9 ARE RETRIEVED, BUT THEY PROBABLY HAVE BEEN COPIED TO OTHER
10 FLASH DRIVES OR THUMB DRIVES OR COMPUTERS. AND THEY'RE IN THE
11 ETHER AND THEY MAY NOT BE -- IT MAY NOT BE POSSIBLE TO
12 RETRIEVE THIS INFORMATION.

13 MR. THOREEN: I UNDERSTAND, YOUR HONOR.

14 THE COURT: ALL RIGHT. ANYTHING FURTHER BY COUNSEL?

15 MS. MEHTA: NO, YOUR HONOR. ON THAT LAST POINT, I
16 WILL SAY THAT THE DOCUMENTS HAVE ALREADY BEEN USED PUBLICLY.
17 THEY ARE ALREADY OUT THERE. IT'S NOT A QUESTION OF WHETHER.
18 IT'S A QUESTION OF HOW MUCH NOW MORE IS GOING TO BE RELEASED
19 AND HAS ALREADY BEEN RELEASED. AND I THINK THE FINAL POINT
20 JUST TO ECHO SOMETHING THAT MR. LERNER SAID AND, YOU KNOW, THE
21 FINAL REQUEST THAT WE WOULD MAKE TO YOUR HONOR AS YOU GO BACK
22 TO CONSIDER THIS IS TO -- WHEN YOU SCRUTINIZE THE DECLARATION
23 FOR MR. KRAMER AND FROM THE LAWYERS, TO THINK ABOUT WHETHER OR
24 NOT IT IS CREDIBLE THAT MR. KRAMER DID THIS ON HIS OWN GIVEN
25 HIS OWN STATEMENTS ABOUT THE INVOLVEMENT OF HIS LEGAL TEAM IN
26 ALL OF HIS COMMUNICATIONS WITH THE DCMS COMMITTEE AND WITH THE

1 MEDIA ENTITIES INVOLVED IN THIS.

2 AND GIVEN THAT AND GIVEN THE WAY THIS ALL CAME ABOUT
3 WHERE IT WAS DONE AT THE HANDS OF THE VERY PERSON THE LEGAL
4 TEAM SAID THEY WERE CLOSELY OVERSEEING, IT IS I THINK AT LEAST
5 SUBJECT TO SERIOUS QUESTION HOW MUCH KNOWLEDGE AND INVOLVEMENT
6 THE LAWYERS HAVE HAD THROUGHOUT THIS WHOLE PROCESS.

7 WE HAVE SEEN THE LAWYERS TALKING TO THE MEDIA
8 THROUGHOUT THIS CASE. WE HAVE SEEN THEM INVOLVED IN THESE
9 ULTERIOR EXTRAJUDICIAL AVENUES OF WHATEVER RELIEF THEY'RE
10 TRYING TO GET. THEIR INVOLVEMENT IS CENTRAL. AND TO PRESERVE
11 THE EVIDENCE AND THEN TAKE THE LIMITED DEPOSITION TO GET TO
12 THE BOTTOM OF WHAT THEIR ROLE WAS IS INCREDIBLY IMPORTANT
13 HERE BEYOND MERELY THE INVOLVEMENT OF MR. KRAMER AND
14 MR. SCARAMELLINO. THAT'S A GIVEN. WE KNOW THEY VIOLATED THE
15 PROTECTIVE ORDER.

16 THE QUESTION IS TO WHAT EXTENT WAS COUNSEL INVOLVED
17 AND THERE IS -- THERE ARE RED FLAGS EVERYWHERE THAT SUGGEST
18 THAT COUNSEL WAS INVOLVED AND FROM OUR PERSPECTIVE VERY HUMBL
19 IT IS INCREDIBLY IMPORTANT THAT THE COURT GET TO THE BOTTOM OF
20 THAT BECAUSE OF MR. LERNER'S FINAL POINT WHICH IS THE WHOLE
21 SYSTEM OF DISCOVERY BREAKS DOWN IF LAWYERS CAN'T BE TRUSTED
22 WITH CONFIDENTIAL INFORMATION OR FIND AVENUES TO END RUN
23 AROUND THE COURT'S ORDERS FOR WHATEVER TACTICAL GAME THEY
24 PERCEIVE THEY ARE GOING TO GET BY DISCLOSING INFORMATION TO
25 THE MEDIA OR TO OTHER ENTITIES.

26 IT IS NOT JUST MR. KRAMER AND MR. SCARAMELLINO THAT

1 HAVE UNDERMINED THAT VERY FUNDAMENTAL PREMISE SYSTEM. THERE'S
2 AT LEAST A SUBSTANTIAL REASON TO BELIEVE THE LAWYERS HAD
3 KNOWLEDGE OF IT AND WERE INVOLVED IN THAT AS WELL, YOUR HONOR.

4 THE COURT: THANK YOU.

5 MR. GODKIN: YOUR HONOR, MAY I MAKE ONE FINAL POINT?

6 THE COURT: YES, SIR.

7 MR. GODKIN: TO REITERATE WHAT I SAID EARLIER, TO
8 THE EXTENT THAT YOU ARE INCLINED TO ORDER DOCUMENTS FROM THE
9 LAWYERS AND DEPOSITIONS FROM THE LAWYERS, I WOULD RESPECTFULLY
10 REQUEST THAT YOU GIVE US AN OPPORTUNITY TO BE HEARD. SO THAT
11 WE CAN FULLY BRIEF PRIVILEGE ISSUES AS WELL AS GIVE US
12 SUFFICIENT TIME TO ENGAGE COUNSEL TO REPRESENT US AT ANY
13 DEPOSITIONS THAT MAY TAKE PLACE.

14 IN OTHER WORDS, MS. MEHTA AND MR. LERNER ARE ASKING
15 FOR A LOT OF THINGS TO HAPPEN NEXT WEEK. AS A PRACTICAL
16 MATTER, THAT GIVES US NO TIME AT ALL TO ENGAGE COUNSEL AND
17 DEAL WITH ALL THESE ISSUES. SO I WOULD JUST RESPECTFULLY
18 REQUEST THAT YOUR ORDER ALLOW SUFFICIENT TIME SO THAT WE CAN
19 TAKE CARE OF THOSE THINGS.

20 THE COURT: OKAY. THANK YOU, MR. GODKIN. I WANT TO
21 REITERATE THE FACT THAT THE REASON THAT YOU ARE IN THIS FIX IS
22 BECAUSE AT THE VERY LEAST OF YOUR PRINCIPAL PLAINTIFF AND HIS
23 CONDUCT. THANK YOU.

24 THE COURT IS GOING TO TAKE A RECESS WHILE IT
25 FASHIONS AN ORDER. EVERYONE, REMAIN IN THE COURTROOM. AND
26 THE COURT WILL EXECUTE THE ORDER, WILL READ THE ORDER INTO THE

1 RECORD AND EXECUTE THE ORDER SHORTLY.

2 (WHEREUPON, A RECESS WAS TAKEN.)

3 THE COURT: THE RECORD SHALL REFLECT THAT THE COURT
4 HAS TAKEN SOME TIME TO REVISE ITS ORDER AND TO PREPARE A FINAL
5 ORDER CONCERNING THE MATTERS RELATING TO THIS HEARING TODAY.
6 THE COURT HAS READ AND CONSIDERED THE MOVING PARTIES AND THE
7 OPPOSITION PAPERS AND ARGUMENTS OF COUNSEL. AND I WANT TO
8 REITERATE THE FOLLOWING BECAUSE THE NOTICE AND TIMING OF
9 CERTAIN EVENTS ARE SIGNIFICANT.

10 WITH REGARD TO THE ORDER, ON NOVEMBER 19TH, 2018,
11 THIS COURT SET A BRIEFING SCHEDULE ON DEFENDANT FACEBOOK,
12 INC.'S EX PARTE APPLICATION FOR THE EXPEDITED BRIEFING ON A
13 MOTION FOR SANCTIONS AND CONTEMPT BY EMAIL.

14 ON NOVEMBER 20TH, 2018, THIS COURT ISSUED AN ORDER
15 FOR BRIEFING AND STAYING SUBMISSION OF UNREDACTED COPIES OF
16 SEALED DOCUMENTS.

17 ON NOVEMBER 26, THE COURT RECEIVED PLAINTIFF
18 SIX4THREE, LLC'S RESPONSE TO THE NOVEMBER 20TH ORDER AT
19 11:35 A.M., DEFENDANT'S EX PARTE AT 11:55 A.M., AND
20 PLAINTIFF'S "LIMITED RESPONSE" TO DEFENDANT'S EX PARTE AT
21 4:46 P.M.

22 ON NOVEMBER 27, 2018, THIS COURT ORDERED AN ORDER
23 AND NOTICE OF HEARING SETTING A HEARING FOR NOVEMBER 30, 2018,
24 AT 2:00 P.M.

25 ON NOVEMBER 28, 2018, THE COURT RECEIVED DEFENDANT'S
26 RESPONSE TO THE NOVEMBER 20TH ORDER AT 7:02 P.M. AND

1 PLAINTIFF'S RESPONSE TO DEFENDANT'S EX PARTE AT 7:06 P.M.

2 ON NOVEMBER 29TH, 2018, AT 2:31 P.M., MR. GODKIN
3 SENT A LETTER TO BOTH THE COURT AND THE PARTIES. A COPY OF
4 WHICH IS ATTACHED TO MY ORDER AS EXHIBIT A.

5 IT IS HEREBY ORDERED AS FOLLOWS:

6 DEFENDANT'S EX PARTE IS GRANTED, IN PART, AND
7 DENIED, WITHOUT PREJUDICE, IN PART.

8 DEFENDANT'S EX PARTE REQUEST FOR EXPEDITED BRIEFING
9 AND HEARING ON TERMINATING SANCTIONS AND CONTEMPT SANCTIONS IS
10 PROCEDURALLY IMPROPER. NOTICE MUST BE GIVEN PURSUANT TO CODE
11 OF CIVIL PROCEDURE SECTION 2023.030.

12 THE COURT, AFTER NOTICE TO ANY AFFECTED PARTY,
13 PERSON, OR ATTORNEY, AND AFTER OPPORTUNITY FOR HEARING, MAY
14 IMPOSE SANCTIONS AGAINST ANYONE ENGAGING IN CONDUCT THAT IS A
15 MISUSE OF THE DISCOVERY PROCESS. PURSUANT TO THE CASE OF
16 SOLE ENERGY CO. V. HODGES. THAT'S A 2005 CASE AT
17 128 CAL. APP. 4TH, 199 PINPOINT CITATION OF 208. DISCOVERY
18 SANCTIONS MAY NOT BE ORDERED EX PARTE, AND AN ORDER PURPORTING
19 TO DO SO IS VOID.

20 DEFENDANT'S EX PARTE REQUEST FOR EXPEDITED REQUESTS
21 FOR DOCUMENT PRODUCTION IS PROCEDURALLY IMPROPER. NO REQUESTS
22 HAVE BEEN SERVED ON PLAINTIFF AND THE RELIEF REQUESTED IS
23 PREMATURE. FURTHERMORE, A MOTION IS REQUIRED. NOW, PURSUANT
24 TO CODE OF CIVIL PROCEDURE SECTION 2031.260(A), THE RESPONSE
25 DEADLINE TO REQUESTS FOR PRODUCTION IS 30 DAYS UNLESS ON
26 MOTION OF THE PARTY MAKING THE DEMAND, THE COURT HAS SHORTENED

1 THE TIME FOR RESPONSE.

2 THERE ARE ALSO PROVISIONS SET FORTH IN WEIL & BROWN
3 WHICH ARE SECONDARY AUTHORITIES THAT ADDRESS THIS PROCEDURAL
4 ISSUE, AND I CITED THEM IN MY ORDER. HOWEVER, THE COURT MAY
5 ISSUE AN ORDER SHORTENING TIME PURSUANT TO EX PARTE
6 APPLICATION ON ANY SUCH MOTION. AND I'M GOING TO DO JUST
7 THAT.

8 THE DEFENDANT'S EX PARTE REQUEST TO SHORTEN NOTICES
9 OF DEPOSITION IS GRANTED TO FIVE DAYS UPON ELECTRONIC SERVICE
10 OR PERSONAL DELIVERY. THIS IS PURSUANT TO CODE OF CIVIL
11 PROCEDURE SECTION 2025.270(D). ALSO WEIL & BROWN AT
12 8:493.3. NOTICES OF DEPOSITION ON PARTIES MAY INCLUDE
13 REQUESTS FOR PRODUCTION. AND THAT'S PURSUANT TO CODE OF CIVIL
14 PROCEDURE SECTION 2025.220(A)(4).

15 DEFENDANT'S EX PARTE REQUEST TO REQUIRE DEPOSITIONS
16 OF PLAINTIFFS PRO HAC VICE COUNSEL IN SAN MATEO COUNTY IS
17 DENIED. AND THAT'S PURSUANT TO CODE OF CIVIL PROCEDURE
18 SECTION 2025.250(A).

19 IN RULING ON THE EX PARTE APPLICATION, THIS COURT
20 TAKES NO POSITION ON THE ISSUES OF THE WAIVER OF
21 ATTORNEY-CLIENT PRIVILEGE OR THE TAKING OF DEPOSITIONS OF ANY
22 OF PLAINTIFF'S COUNSEL AS THAT ISSUE IS NOT RIPE FOR REVIEW.
23 NOTICES OF DEPOSITION, REQUESTS FOR PRODUCTION, AND OBJECTIONS
24 HAVE YET TO BE SERVED.

25 THE COURT IMMEDIATELY ORDERS THAT PLAINTIFF'S
26 COUNSEL STUART GROSS OF GROSS & KLEIN SHALL UNMARK ALL FOLDERS

1 AND FILES MARKED FOR DELETION IN THE SIX4THREE DROPBOX ACCOUNT
2 TO PRESERVE ALL FILES AND FOLDERS. AFTER UNMARKING, MR. GROSS
3 SHALL THEN PROVIDE THE ADMINISTRATOR ACCESS LOG IN AND THE
4 PASSWORD TO THE THIRD PARTY FORENSIC EXAMINER AGREED TO ON THE
5 RECORD. ERIC FRIEDBERG OF STROZ FRIEDBERG, OR HIS AGENTS, AT
6 (212)981-6536 WHICH IS THE OFFICE OR (914)329-9371 WHICH IS
7 THE MOBILE, OR EFRIEDBERG@STROZFRIEDBERG.COM WHICH IS THE
8 EMAIL FOR THE FORENSIC EXAMINER.

9 UPON RECEIPT OF SAID INFORMATION, THE COURT
10 IMMEDIATELY ORDERS THE FORENSIC EXAMINER TO MAINTAIN CHAIN OF
11 CUSTODY, TAKE ALL MEASURES TO RESTRICT ACCESS TO, AND PRESERVE
12 THE DATA FROM THE SIX4THREE DROPBOX ACCOUNT, INCLUDING BUT NOT
13 LIMITED TO IMAGING, FOR PRESERVATION OF THE EVIDENCE UNTIL
14 FURTHER ORDER OF THIS COURT.

15 THE COURT IMMEDIATELY ORDERS THAT MR. THEODORE
16 KRAMER SHALL NOT OPEN OR ACCESS, IN ANY WAY, THE LAPTOP HE
17 USED TO ACCESS DEFENDANT'S HIGHLY CONFIDENTIAL DOCUMENTS AND
18 TRANSFER THOSE FILES TO THE USB THUMB-DRIVE TO PARLIAMENT
19 UNTIL FURTHER ORDER OF THE COURT.

20 THE COURT IMMEDIATELY ORDERS THAT MR. KRAMER SHALL
21 NOT OPEN, ACCESS, MODIFY, OR DELETE ANY STORAGE OR BACK-UP
22 DEVICES FOR HIS LAPTOP, WHETHER IN PHYSICAL FORMAT THAT IS TO
23 SAY PHYSICAL STORAGE DEVICES. FOR EXAMPLE, USB THUMB-DRIVE OR
24 IN THE CLOUD. FOR EXAMPLE, CLOUD STORAGE.

25 MR. KRAMER, TO BE ACCOMPANIED BY PLAINTIFFS' COUNSEL
26 DAVID GODKIN AND STUART GROSS, SHALL MAKE AVAILABLE FOR PICK

1 UP AT GROSS & KLEIN, THE EMBARCADERO, PIER 9, SUITE 100,
2 SAN FRANCISCO, CA 94111 - THE LAPTOP, ALL PHYSICAL STORAGE
3 DEVICES, IDENTIFY IN WRITING ALL CLOUD STORAGE, AND PROVIDE
4 ANY LOG-IN INFORMATION NECESSARY FOR THE FULL AND COMPLETE
5 ACCESS TO ALL DATA IN THE AFOREMENTIONED FORENSIC TO THE
6 FORENSIC EXAMINER NO LATER THAN FRIDAY, NOVEMBER 30TH, 2018,
7 AT 9:00 O'CLOCK P.M.

8 DEFENDANT'S COUNSEL ARE PERMITTED TO BE PRESENT FOR
9 THIS PICK UP. THE FORENSIC EXAMINER SHALL PICK UP, MAINTAIN
10 CHAIN OF CUSTODY, TAKE ALL MEASURES TO RESTRICT ACCESS TO, AND
11 PRESERVE THE DATA ON THE LAPTOP, ALL PHYSICAL STORAGE DEVICES,
12 AND CLOUD STORAGE, INCLUDING BUT NOT LIMITED TO IMAGING, FOR
13 PRESERVATION OF THE EVIDENCE UNTIL FURTHER ORDER OF THE COURT.

14 MR. KRAMER, TO BE ACCOMPANIED BY MR. GODKIN AND
15 MR. GROSS, SHALL MAKE HIS MOBILE DEVICES AVAILABLE AND PROVIDE
16 ANY LOG IN INFORMATION NECESSARY FOR THE FULL AND COMPLETE
17 ACCESS FOR PRESERVATION OF DATA ON THOSE DEVICES TO THE
18 FORENSIC EXAMINER AT GROSS & KLEIN NO LATER THAN FRIDAY,
19 NOVEMBER 30TH AT 9:00 O'CLOCK P.M.

20 THE FORENSIC EXAMINER SHALL TAKE ALL MEASURES TO
21 PRESERVE THE DATA ON THE MOBILE DEVICES, INCLUDING BUT NOT
22 LIMITED TO IMAGING, FOR PRESERVATION OF THE EVIDENCE UNTIL
23 FURTHER ORDER OF THIS COURT. DEFENDANT'S COUNSEL ARE
24 PERMITTED TO BE PRESENT FOR THIS DATA PRESERVATION BY THE
25 FORENSIC EXAMINER. UPON COMPLETION OF THE IMAGING OF THE
26 MOBILE DEVICES, THE FORENSIC EXAMINER SHALL RETURN THE MOBILE

1 DEVICES TO MR. KRAMER.

2 THE COURT ORDERS MR. KRAMER SHALL NOT DELETE ANY
3 DATA FROM HIS MOBILE DEVICES, WHATSOEVER, UNTIL FURTHER ORDER
4 OF THIS COURT. IF ANY OF HIS MOBILE DEVICES ARE SET TO
5 AUTOMATICALLY DELETE ANY DATA, THE COURT INSTRUCTS MR. KRAMER
6 TO TURN OFF THAT SETTING.

7 THE COURT IMMEDIATELY ORDERS THAT MR. THOMAS
8 SCARAMELLINO, WHO IS A MEMBER OF SIX4THREE'S LEGAL TEAM, SHALL
9 NOT OPEN OR ACCESS, IN ANY WAY, THE LAPTOP OR COMPUTER HE USED
10 TO ACCESS SIX4THREE'S DROPBOX AND THAT MR. SCARAMELLINO SHALL
11 NOT OPEN, ACCESS, MODIFY, OR DELETE ANY PHYSICAL STORAGE
12 DEVICES OR CLOUD STORAGE FROM HIS LAPTOP OR COMPUTER.

13 MR. SCARAMELLINO SHALL MAKE AVAILABLE FOR PICK UP AT
14 THE ADDRESS PROVIDED BY MR. GODKIN, 2674 STATE ROUTE 42,
15 FORESTBURGH, NY 12777 - THE LAPTOP OR COMPUTER, HIS PHYSICAL
16 STORAGE DEVICES, AND IDENTIFY IN WRITING ALL CLOUD STORAGE AND
17 PROVIDE ANY LOG IN INFORMATION NECESSARY FOR THE FULL AND
18 COMPLETE ACCESS TO ALL DATA IN THE AFOREMENTIONED TO THE
19 FORENSIC EXAMINER NO LATER THAN SATURDAY, DECEMBER 1ST, 2018,
20 AT 12:00 O'CLOCK P.M. THE FORENSIC EXAMINER SHALL PICK UP,
21 MAINTAIN CHAIN OF CUSTODY, TAKE ALL MEASURES TO RESTRICT
22 ACCESS TO, AND PRESERVE THE DATA ON THE LAPTOP OR COMPUTER,
23 MR. SCARAMELLINO'S PHYSICAL STORAGE DEVICES, AND
24 MR. SCARAMELLINO'S CLOUD STORAGE, INCLUDING BUT NOT LIMITED TO
25 IMAGING, FOR PRESERVATION OF THE EVIDENCE UNTIL FURTHER ORDER
26 OF THE COURT.

1 THE COURT ORDERS THAT THE FORENSIC EXAMINER SHALL
2 NOT DISCLOSE ANY DATA PRESERVED OR COLLECTED IN THIS ACTION TO
3 ANY PARTY, NON-PARTY, PERSON OR ENTITY, UNTIL FURTHER ORDER OF
4 THE COURT.

5 MR. KRAMER SHALL AUTHENTICATE AND PRODUCE FULL
6 COPIES OF THE EMAILS AND ATTACHMENTS HE PRODUCED AS
7 EXHIBITS TO HIS DECLARATION FILED IN SUPPORT OF PLAINTIFF'S
8 BRIEF IN RESPONSE TO THE NOVEMBER 20TH ORDER, FILED
9 NOVEMBER 26, 2018, TO DEFENDANT NO LATER THAN DECEMBER 1ST,
10 2018, AT 9:00 O'CLOCK A.M. THIS SHALL INCLUDE, BUT IS NOT
11 LIMITED, TO THE THREE ATTACHMENTS IN EXHIBIT 1 THAT IS QUOTE
12 "SUMMARY OF COMPLAINT.PDF," CLOSE QUOTE FILED CORRECTED
13 OPPOSITION TO INDIVIDUAL DEFENDANTS ANTI-SLAPP.PDF," CLOSE
14 QUOTE OR QUOTE "REQUESTS FOR PRODUCTIONSIX4THREE.PDF" CLOSE
15 QUOTE AND TEXT IDENTIFIED AS HIDDEN BY QUOTE "QUOTED TEXT
16 HIDDEN" CLOSE QUOTE AT EXHIBIT 2, PAGE 2 AND EXHIBIT 5,
17 PAGE 2. REFER TO THE DEFENSE RESPONSE TO THE NOVEMBER 20TH
18 ORDER AT PAGE 6, LINES 20 TO 21. THESE EMAILS AND ATTACHMENTS
19 SHALL BE BATES-STAMPED FOR EASE OF FUTURE REFERENCE FOR BOTH
20 PARTIES AND THE COURT.

21 THE PROVISION FOR PRESERVATION OF EVIDENCE IN THE
22 NOVEMBER 20TH ORDER REMAINS IN EFFECT AND IS ORDERED EXTENDED
23 TO APPLY TO ANY STORAGE OR BACK-UP DEVICES FOR ANY MOBILE
24 DEVICES, WHETHER IN PHYSICAL FORMAT OR IN THE CLOUD. FOR
25 EXAMPLE, THE ICLOUD.

26 GOOD CAUSE APPEARS TO ORDER PRESERVATION OF THE

1 AFOREMENTIONED BASED ON MR. KRAMER'S ADMITTED ACTIONS, THE
2 CLOUD CAST BY PLAINTIFF'S COUNSEL, COUNSEL'S CHANGE IN
3 NARRATIVE IN THE NOVEMBER 29TH LETTER, WHICH IS NOT SUPPORTED
4 BY COMPETENT EVIDENCE. PLAINTIFF'S COUNSEL'S ASSERTION THAT
5 QUOTE "IT DOES NOT APPEAR THAT MR. KRAMER'S DELETION OF LOCAL
6 COPIES OF THE DOCUMENTS FROM HIS COMPUTER WOULD AFFECT ANY
7 ELECTRONIC EVIDENCE OF HIS PROVISION OF DOCUMENTS, IF ANY
8 EXISTED. PERIOD. IT APPEARS THAT THIS INFORMATION, IF IT
9 EXISTED, WOULD BE CONTAINED IN THE SYSTEM LOG OF HIS LAPTOP."
10 PERIOD CLOSE QUOTE. THAT IS THE NOVEMBER 29TH LETTER AT
11 PAGE 2.

12 MR. KRAMER'S ADMISSION THAT HE QUOTE "DOES NOT
13 RECALL THE EXACT FILES THAT HE TRANSFERRED." CLOSE QUOTE.
14 THAT IS KRAMER'S DECLARATION IN SUPPORT OF PLAINTIFF'S
15 RESPONSE TO THE NOVEMBER 20TH ORDER, FILED NOVEMBER 26, 2018,
16 AT PAGE 5, LINES 23 TO 25. AND FOR THE MATTERS DISCUSSED ON
17 THE RECORD.

18 FOR DISCOVERY DISPUTES, THE PARTIES ARE REMINDED OF
19 THE DISCOVERY PROCEDURES SET FORTH IN THE CASE MANAGEMENT
20 ORDER NUMBER 1, PARAGRAPH 11. SEE THE CASE MANAGEMENT ORDER
21 14, PARAGRAPH 6. ANY REQUEST FOR A DISCOVERY CONFERENCE SHALL
22 BE DELIVERED TO DEPARTMENT 23 BOTH ELECTRONICALLY AND IN
23 PHYSICAL FORM.

24 PLAINTIFF'S COUNSEL SHALL REMAIN IN THIS ACTION
25 UNTIL FURTHER ORDER OF THE COURT.

26 MR. GODKIN SHALL IMMEDIATELY PROVIDE A COPY OF THIS

1 ORDER TO MR. SCARAMELLINO UPON RECEIPT.

2 LASTLY, THE COURT FINDS THAT ALTHOUGH THE SUMMARY OF
3 FACTS PRESENTED BY DEFENDANT IN ITS EX PARTE AND RESPONSE TO
4 THE NOVEMBER 20TH ORDER IS COMPELLING, IT IS NOT IN AFFIDAVIT
5 FORM. CODE OF CIVIL PROCEDURE SECTION 20 -- I'M SORRY. CODE
6 OF CIVIL PROCEDURE SECTION 1211(A) CONTROLS THAT PARTICULAR
7 COMMENT. AND YOU SHOULD SEE YOUR EX PARTE AT PAGE 2, LINES 24
8 TO 7, LINE 20. SO THAT'S PAGES 2, LINE 24 THROUGH PAGE 7,
9 LINE 20. AND THE DEFENSE RESPONSE TO THE NOVEMBER 20TH ORDER
10 AT PAGE 1, LINES 10 TO 4, LINE 5; PAGE 5, LINES 19 TO PAGE 6,
11 LINE 8; AND PAGE 9, LINES 3 TO PAGE 10:5. FINALLY, PAGE 10,
12 LINE 16 TO PAGE 11, LINE 14. I EXPECT PLAINTIFF AND THE
13 PLAINTIFF'S COUNSEL TO COOPERATE WITH THE EXPEDITED DISCOVERY.

14 FINALLY, THERE IS A PENDING MOTION FOR ATTORNEY'S
15 FEES THAT'S SCHEDULED FOR DECEMBER 7TH, 2018. THAT HEARING
16 SHALL BE CONTINUED TO JANUARY 11TH, 2019, AT 9:00 A.M. SO
17 THERE WILL BE NO DECEMBER 7 HEARING. THAT HEARING IS
18 CONTINUED TO JANUARY 11, 2019, AT 9:00 A.M.

19 IT IS SO ORDERED. THE COURT IS IN POSSESSION OF THE
20 ORDER THAT ITS JUST READ FROM. AND THE COURT IS EXECUTING
21 THIS ORDER IN OPEN COURT. IT IS SO ORDERED. AND I'M ALSO
22 ORDERING MY COURTROOM CLERK TO CONFORM THESE ORDERS AND FILE
23 STAMP AND ENDORSE SEPARATE COPIES FOR DELIVERY TO COUNSEL.

24 THE COURT CAN AND WILL MAKE ITSELF AVAILABLE FOR A
25 DISCOVERY -- I'M SORRY -- DISCOVERY. I'VE BEEN TALKING A LOT
26 TODAY, LADIES AND GENTLEMEN. AND MY SINCERE APOLOGIES. I

1 WILL MAKE MYSELF AVAILABLE FOR A DISCOVERY CONFERENCE ON
2 DECEMBER 7TH. AT THE TIME THAT WE WERE GOING TO HEAR THE
3 MOTIONS. THAT'S ABOUT AS EXPEDIENT AS I CAN BE. AND WE'RE
4 TAKING FULL ADVANTAGE OF THAT TIME WE'RE ALLOCATING TO THE
5 ATTORNEY'S FEES MOTIONS. IT IS SO ORDERED.

6 THANK YOU, EVERYONE. COUNSEL STAND BY FOR THE
7 DISTRIBUTION OF THE ORDERS THAT HAVE BEEN FILED ENDORSED. THE
8 COURT IS ALSO GOING TO POST A COPY OF THE ORDER THAT I JUST
9 READ FROM AND SIGNED ON THE DOOR. THANK YOU VERY MUCH FOR
10 YOUR ATTENTION AND PATIENCE, EVERYONE. COURT IS IN RECESS.

11 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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1 STATE OF CALIFORNIA)

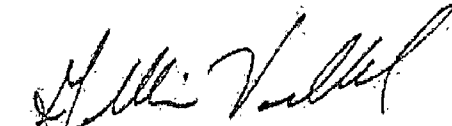
2) SS.

3 COUNTY OF SAN MATEO)

4 I, GERALDINE VANDEVELD, OFFICIAL COURT REPORTER,
5 COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DO HEREBY CERTIFY:

6 THAT THE FOREGOING CONTAINS A TRUE, FULL AND CORRECT
7 TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE
8 WITHIN-ENTITLED MATTER THAT WERE REPORTED BY ME AT THE TIME
9 AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED BY ME OR AT MY
10 DIRECTION INTO LONGHAND TYPEWRITING AND THAT THE SAME IS A
11 CORRECT TRANSCRIPT OF THE PROCEEDINGS.

12 DATED: DECEMBER 3, 2018

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15 GERALDINE VANDEVELD, C.S.R. #8634
16 OFFICIAL COURT REPORTER
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EXHIBIT 8

COMPUTERLAW GROUP LLP

ATTORNEYS AT LAW
401 FLORENCE STREET
PALO ALTO, CALIFORNIA 94301
COMPUTERLAW.COM

TELEPHONE
(650) 327-9800

FAX
(650) 618-1863

December 21, 2018

Via Email

Sonal N. Mehta, Esq.
Durie Tangri LLP
217 Leidesdorff Street
San Francisco, CA 94111
smehta@durietangri.com

Re: Six4Three, LLC v. Facebook, Inc. et al.
San Mateo Super. Ct. Case No. CIV 533328

Dear Counsel:

The various lawyers associated with the non-Facebook side of the above-referenced case have all met and conferred and have reached an approach for the orderly transition of existing counsel for Six4Three, LLC (the "Company") withdrawal and substitution from the above-referenced case.

New counsel for the Company will require 90 to 120 days for the orderly transition. For that reason, we are providing the attached Stipulation for your review and approval. This sets a new schedule for the various items that are currently on the Court's docket. Please let us know if you are signing; if not, let us know the reasons why you will not do so given that this simplifies and provides precisely the practical solution that Judge Swope has repeatedly endorsed, and it is the result of substantial effort of counsel. It will obviously save Judge Swope and his staff added time and burden.

If you cannot agree, we will provide this letter and the attached as well as your reasons for not doing so to the Court on an *ex parte* application seeking to have this Stipulation entered as an Order of the Court. We do believe that a stipulated approach is far preferred and the Company should be allowed to have new counsel come into this case in an orderly fashion. Please advise.

Very truly yours,


Jack Russo

cc: James Murphy, Esq.
David Godkin, Esq.
Donald Sullivan, Esq.
Stu Gross, Esq.

Enclosure

1 Jack Russo (Cal. Bar No. 96068)
2 Christopher Sargent (Cal. Bar No. 246285)
3 COMPUTERLAW GROUP LLP
4 401 Florence Street
5 Palo Alto, CA 94301
6 (650) 327-9800 office
7 (650) 618-1863 fax
8 jrusso@computerlaw.com
9 csargent@computerlaw.com

10 Attorneys for Third Parties
11 THEODORE KRAMER and
12 THOMAS SCARAMELLINO

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

11 **Six4Three, LLC**, a Delaware limited liability
12 company,

13 Plaintiff;

14 v.

15 **Facebook, Inc.**, a Delaware corporation;
16 **Mark Zuckerberg**, an individual;
17 **Christopher Cox**, an individual; **Javier**
18 **Olivan**, an individual; **Samuel Lessin**, an
19 individual; **Michael Vernal**, an individual;
20 **Ilya Sukhar**, an individual; and **Does 1–50**,
21 inclusive,

22 Defendants.

Case No. CIV533328

Assigned for all purposes to Hon. V.
Raymond Swope, Dep't 23

**STIPULATION REGARDING HEARING DATES
ON PENDING AND POTENTIAL MOTIONS**

Action Filed April 10, 2015
Trial Date: April 25, 2019

1 Plaintiff Six4Three, LLC ("643"), Defendants Facebook, Inc. ("Facebook"), Mark
2 Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar
3 (collectively "Defendants"), and third parties Theodore Kramer and Thomas Scaramellino
4 (collectively, "Third Parties"), stipulate as follows:

5 **RECITALS**

6 A. On December 14, 2018 counsel for Plaintiff 643 filed an *ex parte* application for
7 an order shortening time for a motion to be relieved as counsel to be heard;

8 B. In support of that motion, David Godkin submitted a declaration stating that an
9 unwaivable conflict had arisen between himself, his firm Birnbaum & Godkin LLP, and 643;

10 C. Gross & Klein LLP, local counsel for 643, have represented that they have a
11 similar unwaivable conflict with 643.

12 D. On December 17, 2018, the Court set a hearing date for counsel' motion to be
13 relieved for February 7, 2018;

14 E. On December 17, 2018, the Court also set a hearing on Facebook's pending
15 motion for attorney's fees for January 11, 2018;

16 F. 643 has been diligently seeking new counsel to represent it in this matter, but all
17 such potential counsel have informed 643 that they would need at least 90 to 120 days to get up
18 to speed before such counsel would or could substitute in as counsel for 643;

19 G. All parties and the Third Parties are desirous of eliminating unnecessary motion
20 practice before this Court or repeated hearings on the same matters;

21 H. Therefore, all pending or potential motions should be postponed until after new
22 counsel for 643 has substituted in for both Birnbaum & Godkin LLP and Gross & Klein LLP to
23 ensure due process and fair representation of all parties and Third Parties at the hearing on any
24 such motions.

25 **STIPULATION**

26 1. A substitution of counsel for 643 shall be filed no later than March 31, 2018.
27
28

2. The hearing on Facebook's pending motion for attorney's fees, currently set for January 11, 2019 shall be continued to April 30, 2019 or as soon thereafter as the Court is available.

3. Any other motions filed by any parties or third parties shall be set for hearing no sooner than April 30, 2019.

GROSS & KLEIN LLP

By: Stuart G. Gross

Attorneys for Plaintiff
SIX4THREE, LLC

COMPUTERLAW GROUP LLP

By: Jack Russo
Jack Russo (Dec 21, 2018)

Attorneys for Third Parties
THEODORE KRAMER AND THOMAS
SCARAMELLINO

WILSON ELSE MOSKOWITZ EDELMAN &
DICKER LLP

By: Donald P. Sullivan
Donald P. Sullivan (Dec 22, 2018)

Attorneys for
GROSS & KLEIN LLP

DURIE TANGRI LLP

By: Sonal Mehta

Attorneys for Defendants
FACEBOOK, INC., MARK ZUCKERBERG,
CHRISTOPHER COX, JAVIER OLIVAN, SAMUEL
LESSIN, MICHAEL VERNAL, AND ILYA SUKHAR

BIRNBAUM & GODKIN, LLP

By: David Godkin
David Godkin (Dec 21, 2018)

Attorneys for Plaintiff
SIX4THREE, LLC

MURPHY PEARSON BRADLEY & FEENEY

By: James A. Murphy
James A. Murphy (Dec 21, 2018)

Attorneys for
BIRNBAUM & GODKIN, LLP

[PROPOSED] ORDER

1. A substitution of counsel for 643 shall be filed no later than March 31, 2018.

2. The hearing on Facebook's pending motion for attorney's fees, currently set for January 11, 2019 shall be continued to April 30, 2019 or as soon thereafter as the Court is available.

3. Any other motions filed by any parties or third parties shall be set for hearing no sooner than April 30, 2019.

IT IS SO ORDERED:

Judge of the Superior Court

EXHIBIT 9

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

Six4Three, a Delaware limited liability
company,

Plaintiff;

v.

Facebook, Inc., a Delaware corporation;
Mark Zuckerberg, an individual;
Christopher Cox, an individual; **Javier**
Olivan, an individual; **Samuel Lessin**, an
individual; **Michael Vernal**, an individual;
Ilya Sukhar, an individual; and **Does 1-50**,
inclusive,

Defendants.

Case No. CIV533328

Assigned for all purposes to Hon. V.
Raymond Swope, Dep't 23

**DECLARATION OF THEODORE KRAMER
REGARDING PLAINTIFF SIX4THREE'S
CONDITIONAL ACCEPTANCE OF BIRNBAUM
& GODKIN AND GROSS & KLEIN'S MOTION
TO BE RELIEVED AS COUNSEL FOR
PLAINTIFF SIX4THREE, LLC**

Date: February 22, 2019
Time: 9:00 a.m.
Department: 23

Action Filed April 10, 2015
Trial Date: None set

1 I, Theodore Kramer, declare under penalty of perjury as follows.

2 1. My name is Theodore Kramer. I am over the age of 18. I make these statements in
3 support of Plaintiff Six4Three's ("Plaintiff" or "643") Conditional Acceptance of Birnbaum &
4 Godkin and Gross & Klein's Motion to be Relieved as Counsel. I have personal knowledge of
5 the matters stated in this declaration, and I believe those matters to be true.

6 2. I am the CEO (and Managing Member) of Plaintiff 643 and make these
7 statements on its behalf.

8 3. I believe we at 643, including the legal team, complied with Section 16 of the
9 Protective Order and all other Court Orders. In coordination with counsel for 643, I took
10 measures at the time the Dropbox sub-folder in which Facebook's highly confidential files were
11 reviewed to prevent my access to those files and requested that counsel do the same. Prior to the
12 United Kingdom Parliament ordering me to search my computer under its direct supervision, I
13 had never accessed that Dropbox sub-folder. I have never reviewed any files or documents
14 produced by Facebook with the "Highly Confidential" Bates Stamped designation.

15 4. Beyond our control (and certainly beyond my control), it is now apparent as a
16 result of the events in the United Kingdom that at least some of the Dropbox cloud sub-folders
17 did not have the proper permission settings or that the organization of the sub-folders in the
18 Dropbox cloud account was not synced fully with the organization of the folders on the personal
19 computers of the team members who had access to the account, or some other technical issue
20 occurred that modified or undermined what I believed to be the permissions settings which I
21 always understood were limited to the litigation team comprised of Birnbaum & Godkin and
22 Gross & Klein who are both counsel to Plaintiff.

23 5. However, since it has become apparent that Birnbaum & Godkin and Gross &
24 Klein were and are both no longer willing or able to represent 643 based on their statements to
25 this Court that they have an "unwaivable conflict" resulting from Facebook's unfounded
26 accusations against 643 and counsel, and in light of counsel's continued (and continuous) failure
27 to substantively represent Plaintiff in the various motions and applications filed by Defendant
28

1 since late November 2018, I have made a concerted effort to secure substitute counsel for
2 Plaintiff, contacting and interviewing over a dozen law firms in the process.

3 6. Besides the firm of Mr. Edward V. King Jr., King & Kelleher, LLP, who
4 confirmed in a declaration that he will not take on the case unless given substantial time to get up
5 to speed, I have been unable to find a firm which has demonstrated strong interest in the case,
6 particularly in light of the potential need to get up to speed in a matter of weeks with pending but
7 as yet unknown terminating sanctions or unknown contempt motions hanging collaterally over
8 this proceeding.

9 7. Of these law firms, a significant number have expressed that they are unable to
10 represent Plaintiff due to a conflict of interest generated by their previous or ongoing
11 representation of Defendant Facebook, Inc.

12 8. Law Firm No. 1, with over 1,000 attorneys over a dozen international offices,
13 declined the case due to its current representation of Facebook, Inc.

14 9. Law Firm No. 2, in San Francisco with nearly 100 attorneys, declined the case
15 due to its current representation of Facebook, Inc.

16 10. Law Firm No. 3, in San Mateo with less than ten attorneys, declined the case due
17 to a conflict of interest involving Facebook, Inc.

18 11. Law Firm No. 4, in San Francisco with almost forty attorneys, declined the case
19 due to a conflict of interest involving Facebook, Inc.

20 12. Law Firm No. 5, in Mountain View with over 350 attorneys, declined the case due
21 to its current representation of Facebook, Inc.

22 13. Law Firm No. 6, in Los Angeles with almost forty attorneys, informed me of a
23 potential conflict owing to its ongoing involvement in a suit against Facebook, Inc.

24 14. Given the continued inability or unwillingness of Plaintiff's counsel of record to
25 represent Plaintiff, as well as the hardship of acquiring unconflicted substitute counsel to
26 represent Plaintiff in this matter, I now realize that the original March 31, 2019 estimate in the
27 Stipulation Regarding Hearing Dates on Pending and Potential Motions, submitted to the Court
28 on December 26, 2018 was overly optimistic.

15. It is likely that Plaintiff will need a longer extension of time to acquire new counsel and allow them to get up to speed without prejudicing Plaintiff.

16. Specifically, on behalf of Plaintiff and as its CEO and Managing Member, I will conditionally accept and agree to the motion to withdraw filed by Birnbaum & Godkin and Gross & Klein if Plaintiff is given until **May 31, 2019** to retain new counsel.

17. I will continue diligent efforts to retain counsel, but I believe our current counsel should remain responsible for managing the electronically stored information (“ESI”) on cloud accounts pending new counsel being appointed by Plaintiff.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was entered into on January 24, 2019 in San Francisco, California.


Theodore Kramer

EXHIBIT 10

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
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ZACHARY G. F. ABRAHAMSON (SBN 310951)
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217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant
Facebook

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**DEFENDANT FACEBOOK, INC.'S
SUPPLEMENTAL OPPOSITION TO
DECLARATION OF THEODORE KRAMER**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

1 The Court should deny Birnbaum & Godkin LLP (“Birnbaum & Godkin”) and Gross & Klein
2 LLP’s (“Gross & Klein”) motions to withdraw. The new assertions in the Declaration of Theodore
3 Kramer Regarding Plaintiff Six4Three’s Conditional Acceptance of Birnbaum & Godkin and Gross &
4 Klein’s Motion to be Relieved as Counsel for Plaintiff Six4Three, LLC (“Kramer Decl.”) do not provide
5 any new basis for granting the motions. Instead, Mr. Kramer shows that granting Birnbaum & Godkin
6 and Gross & Klein’s motions would unduly delay the case and proves Facebook, Inc.’s (“Facebook”) arguments correct. Defendant Facebook, Inc.’s Opposition to Birnbaum & Godkin, LLP and Gross &
7 Klein LLP’s Motions to be Relieved as Counsel for Plaintiff Six4Three, LLC at 12–15 (Jan. 17, 2019)
8 (“Opp.”). Alternatively, if the Court grants the motions to withdraw, it should require Six4Three to find
9 new counsel in 14 days and deny Mr. Kramer’s request that Six4Three receive an *additional four*
10 *months* to find new counsel and delay the investigation into Six4Three and its counsel’s violations of this
11 Court’s orders.

12
13 The Kramer Declaration shows that granting the motions to withdraw will unduly delay the Court
14 and Facebook’s investigations into Six4Three and its counsel’s misconduct. Six4Three has been on
15 notice that it needed new counsel since November 30, 2018. Opp. at 13. It has already had two months
16 to obtain new counsel and appears to have made virtually no good faith efforts to do so. Mr. Kramer
17 claims that he contacted and interviewed “over a dozen law firms.” Kramer Decl. ¶ 5. There are at least
18 three problems with this assertion.

19 First, it is belied by the experiences of Six4Three and its counsel. As explained in Facebook’s
20 Opposition, Mr. Kramer, Mr. Scaramellino, Birnbaum & Godkin, and Gross & Klein (and Mr. Gross) all
21 found counsel to represent them in this case in under a week. Opp. at 13–14. Mr. Kramer even found
22 *three* lawyers to represent him: Mr. Thoreen, a Washington, D.C. international law firm, and Mr. Russo.
23 Opp. at 14. Birnbaum & Godkin likewise found two law firms to represent it, Morrison Mahoney LLP
24 and Murphy Pearson Bradley & Feeney. Opp. at 14. This was in spite of “the potential need to get up to
25 speed in a matter of weeks with pending but as yet unknown terminating sanctions or unknown contempt
26 motions hanging collaterally over this proceeding.” Kramer Decl. ¶ 6. It simply is not credible that
27 finding counsel for Six4Three will require *another four months* when Mr. Kramer, Mr. Scaramellino,
28 and Six4Three’s counsel found law firms to represent them in a week or less.

1 Second, it is at best questionable whether Mr. Kramer has been searching in good faith for
2 attorneys that could represent him. For example, he claims to have contacted a 350-lawyer firm based in
3 Mountain View, California—i.e., Fenwick & West—and to have learned that they have a conflict. But a
4 simple Google search would have revealed that Fenwick & West could not take the case—Fenwick’s
5 own website includes announcement after announcement of matters on which the firm has represented
6 Facebook and Fenwick’s Wikipedia page lists Facebook as a client over half-a-dozen times (more than
7 any other client). Tellingly, of the approximately one dozen law firms Mr. Kramer contacted, half have a
8 conflict with Facebook. And amazingly, he suggests that both law firms that represent Facebook are
9 conflicted and law firms that are *adverse to* Facebook are conflicted. Kramer Decl. ¶¶ 7–13. For the
10 remainder, Mr. Kramer does not give any reason why the other half-dozen law firms cannot represent
11 Six4Three. He also does not explain why it should take him another four months, for a total of six
12 months, to find un-conflicted counsel for Six4Three when it took him less than a week to find three law
13 firms to represent himself in his personal capacity. Opp. at 14.

14 Third, if Mr. Kramer were diligently searching for new counsel for Six4Three, he would have
15 contacted more than “over a dozen law firms” (half of which have conflicts) in the past two months.
16 Instead, Mr. Kramer has very little incentive to try to find a new law firm to represent Six4Three—the
17 more law firms he contacts that have conflicts and the longer it takes for him to find a new firm, the more
18 he is able to delay proceedings into his and Six4Three’s legal team’s misconduct.

19 The Court should deny Birnbaum & Godkin and Gross & Klein’s motions to withdraw. But if the
20 Court grants the motions, it should require Six4Three to find new counsel within 14 days. Mr. Kramer
21 was able to find counsel twice as fast for himself; there is no reason he cannot do so for Six4Three.

22
23 Dated: January 31, 2019

DURIE TANGRI LLP

24
25 By: _____


CATHERINE Y. KIM

26 Attorneys for Defendant
27 Facebook, Inc.
28

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On January 31, 2019, I served the following documents in the manner described below:

**DEFENDANT FACEBOOK, INC.'S SUPPLEMENTAL OPPOSITION TO
DECLARATION OF THEODORE KRAMER REGARDING PLAINTIFF
SIX4THREE'S CONDITIONAL ACCEPTANCE OF BIRNBAUM & GODKIN AND
GROSS & KLEIN'S MOTION TO BE RELIEVED AS COUNSEL FOR PLAINTIFF
SIX4THREE, LLC**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

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1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on January 31, 2019, at San Francisco, California.

3
4 
Christina Ortega

EXHIBIT 11

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Electronically
FILED
by Superior Court of California, County of San Mateo
ON 1/17/2019
By /s/ Crystal Swords
Deputy Clerk

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S
OPPOSITION TO BIRNBAUM & GODKIN,
LLP AND GROSS & KLEIN LLP'S MOTIONS
TO BE RELIEVED AS COUNSEL FOR
PLAINTIFF SIX4THREE, LLC**

Date: February 7, 2019
Time: 9:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

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1 **I. INTRODUCTION**

2 As early as March 2018, Six4Three, LLC (“Six4Three”), Birnbaum & Godkin LLP (“Birnbaum &
3 Godkin”), and Gross & Klein LLP (“Gross & Klein”) were conducting an express and intentional campaign
4 to publicize Facebook’s internal, confidential materials in violation of the Court’s Protective Order, and
5 later its sealing orders. At the same time, they were actively and aggressively litigating this case. Now
6 that they are facing the consequences of their conduct, Birnbaum & Godkin and Gross & Klein seek to run
7 from this case, claiming that Facebook, Inc.’s (“Facebook”) allegations have created an unwaivable
8 conflict between them and their client. The Court should deny their motions:

9 *First*, Birnbaum & Godkin and Gross & Klein are not innocent lawyers with an uncontrollable
10 client. Birnbaum & Godkin and Gross & Klein actively campaigned to share Facebook’s confidential
11 information with the media, government entities, and fake experts. They sent emails, made phone calls,
12 and lobbied legislators and law enforcement to investigate Facebook, expressly looking for ways to get
13 confidential information into the hands of those parties. They apparently saw no conflict between
14 themselves and Six4Three when they were engaging in the very conduct that Facebook now seeks to
15 investigate, and they never say how it is that the current proceedings created an unwaivable conflict. If the
16 misconduct itself did not create a conflict, then how does pointing out—and seeking to investigate—the
17 misconduct do so?

18 *Second*, Birnbaum & Godkin and Gross & Klein’s allegations of conflict are conclusory assertions
19 lacking sufficient detail to be credited by the Court. And given that Birnbaum & Godkin and Gross &
20 Klein were directly involved in the violation of multiple Court orders, directed the deletion of evidence to
21 cover up those violations, and affirmatively misled the Court when the Court initially sought to investigate
22 the violations and the cover up, the Court cannot and should not accept their claims of conflict at face
23 value. This situation is unlike any of the cases that Birnbaum & Godkin and Gross & Klein rely on.

24 *Third*, granting the motions will unduly delay the case and create an injustice. The recent
25 production of Birnbaum & Godkin and Gross & Klein’s emails confirms that Mr. Godkin, Mr. Kruzer, and
26 Mr. Gross were actively publicizing confidential, sealed materials for months. That campaign culminated
27 in Mr. Kramer’s disclosure of Facebook’s confidential information to the DCMS Committee in November.
28 Two months later, Six4Three, Birnbaum & Godkin, and Gross & Klein have successfully stonewalled the

1 Court and Facebook's investigation into their misconduct. Facebook is no closer to knowing who has its
2 confidential information, who gave it to them, or how, than it was in November. Delaying this case any
3 further will undermine the Court's authority and compound the prejudice to Facebook.

4 II. FACTUAL BACKGROUND

5 A. Birnbaum & Godkin and Gross & Klein Saw No Conflicts When Disclosing 6 Facebook's Confidential Information

7 As early as March 2018, Six4Three, Birnbaum & Godkin, and Gross & Klein were working
8 together to disclose Facebook's confidential information in violation of the Protective Order. Birnbaum
9 & Godkin's emails show that Six4Three, Birnbaum & Godkin, and Gross & Klein (1) shared confidential
10 information with journalists and governmental entities; (2) purported to designate third parties as "experts"
11 under the Protective Order so they could share confidential information with third parties and then have
12 them act as anonymous sources that would supposedly validate that information to members of the media;
13 (3) engaged in a concerted effort, in close coordination with the media, to inundate the Court with Facebook
14 confidential information irrelevant to the issue being adjudicated for the express purpose of making that
15 information public; and (4) when the Court rejected that effort, manufactured a situation designed to
16 provide Six4Three cover to leak the documents to a parliamentary committee in the United Kingdom that
17 subsequently made them public. Far from being unwilling co-conspirators, Birnbaum & Godkin and Gross
18 & Klein actively participated in these actions with Six4Three.

19 *First*, Birnbaum & Godkin's documents show that, for example, Mr. Godkin sent "summaries" of
20 Facebook's confidential information to government entities, reporters, and third parties, and asked them to
21 investigate Facebook.¹ *See, e.g.*, Decl. of Catherine Y. Kim submitted herewith ("Kim Decl.") Exs. 1-4,
22 BG001357, BG001330, BG000156, BG001825. He wrote, "*My firm* has obtained extensive discovery of
23 communications between Zuckerberg and numerous other Facebook executives and employees. . . . *I* have
24 attempted to summarize the evidence below. . . . *I'm* hoping there is an appropriate mechanism for your
25 staff to review this information. . . ." Kim Decl. Ex. 3, BG000156 (emphasis added throughout unless
26 otherwise noted). Both he and Mr. Kruzer had calls with third parties about Facebook's confidential
27

28 ¹ The summaries are misleading and full of mischaracterizations, but disclose protected information that
should never have been used for any purpose outside this case, let alone disclosed to third parties.

1 information and Six4Three's allegations. *See, e.g.*, Kim Decl. Ex. 2, BG001330 (email from Mr. Godkin
2 arranging a call between Mr. Kruzer and the Massachusetts Attorney General's office); Ex. 1, BG001357
3 (email from Mr. Godkin arranging a call between Mr. Kruzer and the United Kingdom Information
4 Commissioner's Office ("ICO")). Likewise, Birnbaum & Godkin worked directly with Six4Three's
5 principal Mr. Kramer, and Six4Three's investor-cum-law clerk Mr. Scaramellino, to coordinate their
6 communications with the media. *See, e.g.*, Kim Decl. Ex. 5, BG007096 (email from Mr. Kramer
7 coordinating a call with him, Mr. Kruzer, and *The Guardian*); Ex. 4, BG001825 (email from Mr. Godkin
8 copying Mr. Scaramellino). Indeed, Mr. Godkin's emails show that he and Six4Three were collaborating
9 so closely to organize a media campaign about Facebook's confidential information that he, and not
10 Six4Three, was to be quoted in news articles. Mr. Scaramellino, supposedly a member of Six4Three's
11 legal team acting under Mr. Godkin's supervision, wrote to *The Guardian* and stated that both he and Mr.
12 Kramer "would very much appreciate if" *The Guardian* left their names out of any media coverage of
13 Facebook's confidential information, and "the only name used is David Godkin, the lead counsel on the
14 case." Kim Decl. Ex. 6, BG003750; *see also* Decl. of David S. Godkin in Opp'n to Facebook's Mots. to
15 Compel with Ex. A Redacted for Public Filing ¶ 7 (June 19, 2017) ("Godkin Supervision Decl."). He
16 copied both Mr. Godkin and Mr. Kruzer on this email, and they did not object to his request. Kim Decl.
17 Ex. 6, BG003750.

18 Mr. Gross similarly participated in the disclosure of Facebook's confidential information. He was
19 copied on communications with the media, and connected third party Open Markets Institute with counsel
20 for their *amicus* brief opposing Facebook's May 30 motion to seal the 4,000 pages of documents that
21 Six4Three lodged. *See, e.g.*, Kim Decl. Ex. 7, BG002164 (email with CNN reporter copying Mr. Gross);
22 Ex. 8, BG001806 (email to the *New York Times*, copying Mr. Gross); Ex. 9, BG002711 (emails from Mr.
23 Gross recommending attorneys for OMI).

24 **Second**, Birnbaum & Godkin actively recruited purported "experts" under the Protective Order and
25 disclosed Facebook's confidential information to them without notification to Facebook. In March 2018,
26 Mr. Godkin sent a long and inaccurate summary of Facebook's confidential information to a podcaster and
27 media personality. Kim Decl. Ex. 10, BG001868. Mr. Godkin suggested that—notwithstanding the
28 Protective Order's requirement that any disclosed confidential or highly confidential information be used

1 “solely for the purpose of this case”—the individual might find the information useful for other endeavors:

2 The evidence we have uncovered is currently subject to a Protective Order in
3 California state court. . . . After our call, if you remain interested in speaking
4 on this issue, which I think puts a lot of meat on the bones of some of your
5 core arguments, then we would be willing to share the evidence with you so
6 long as you agree to abide by the Protective Order (similar to an NDA). *You*
7 *could use the evidence to inform your views and paint a picture*, but not share
8 any of it *directly* until the court agrees for it to go public.

9 *Id.* When the podcaster refused, Mr. Godkin doubled down and importuned him to reconsider. *Id.*

10 Meanwhile, Mr. Scaramellino, a member of the legal team acting under Mr. Godkin’s direction and
11 supervision, appears to have worked with *The Guardian* to retain another individual as an “expert” for the
12 specific purpose of using him as an anonymous source to validate Facebook’s confidential information that
13 Six4Three could not otherwise share with the media. *See* Kim Decl. Ex. 11, BG006394; Godkin
14 Supervision Decl. ¶ 7. Six4Three learned of this “expert” through an introduction by a reporter for *The*
15 *Guardian* that had worked with him on Facebook issues in the past (the same reporter that later connected
16 Mr. Kramer with the DCMS Committee). *See* Kim Decl. Ex. 12, BG007208. And this was with Birnbaum
17 & Godkin’s knowledge—Mr. Godkin and Mr. Kruzer are copied on emails where Mr. Scaramellino and
18 *The Guardian* discuss using this person as an anonymous source. Kim Decl. Ex. 11, BG006394 (“I’m not
19 sure if he could be an anonymous source verifying our allegations without disclosing him as an expert
20 witness I’d like your thoughts on that.”). Mr. Scaramellino included this “expert” on correspondence
21 to several other news entities, presumably so he could serve as a “source” for them as well, and CC’d Mr.
22 Godkin, Mr. Kruzer, and/or Mr. Gross on those emails. *See, e.g.,* Kim Decl. Ex. 13, BG001308 (AP); Ex.
23 7, BG002164 (CNN); Ex. 14, BG002165 (OMI); Ex. 15, BG000149 (Politico). Neither Mr. Godkin, Mr.
24 Kruzer, nor Mr. Gross appears to have raised any concern—let alone a conflict.

25 **Third**, Birnbaum & Godkin and Gross & Klein were instrumental in the campaign to disclose
26 Facebook’s confidential information. In May 2018, Six4Three lodged nearly 4,000 pages of confidential
27 Facebook information under seal, purportedly to support its opposition to the Individual Defendants’ anti-
28 SLAPP Motion. *See* Notice of Lodging Docs. with the Court Conditionally under Seal Pursuant to C.R.C.
29 2.551(B)(3) (May 17, 2018). Before lodging these documents, Birnbaum & Godkin and Gross & Klein
30 were working with media and governmental entities to get the documents filed publicly and thus avoid the
31 Protective Order. More than two weeks before Six4Three lodged this massive volume of irrelevant

1 Facebook confidential information,² Birnbaum & Godkin contacted multiple news outlets and
2 governmental entities to solicit amicus briefs against Facebook's as-of-then-unfiled sealing motions. *See*,
3 *e.g.*, Kim Decl. Ex. 16, BG000855 (Bloomberg); Ex. 2, BG001330 (Massachusetts Attorney General's
4 Office); Ex. 1, BG001357 (ICO); Ex. 4, BG001825 (FTC); Ex. 17, BG001860 (California Attorney
5 General's Office). After lodging Facebook's confidential information, Birnbaum & Godkin continued to
6 press for amicus support not on the merits, but its effort to unseal the documents. *See, e.g.*, Kim Decl. Ex.
7 18, BG007476 (*The Guardian*); Ex. 19, BG006427 (*Wall Street Journal*); Ex. 20, BG006428 (AP). Mr.
8 Kruzer even sent a draft amicus brief to one media entity.³

9 **Fourth**, as we all know, within days of the Court's order sealing or striking the nearly 4,000 pages
10 of Facebook confidential information, Mr. Kramer and Six4Three's legal team, including Birnbaum &
11 Godkin and Gross & Klein, orchestrated the circumstances in which Facebook's confidential information
12 ended up in the hands of the DCMS Committee and the public. Birnbaum & Godkin's emails show that
13 Mr. Godkin was working hand-in-hand with regulators to find a way for them to access Facebook's
14 documents, while Mr. Scaramellino, who was under his direction and supervision, was drafting questions
15 for Members of Parliament to ask Facebook. *See* Kim Decl. Ex. 6, BG0003750 (email from Scaramellino
16 with questions for MPs); Ex. 23, BG000154 (email from Godkin to U.K. ICO stating, "it would take
17 months or even years for [the ICO] to obtain discovery of this information from Facebook. We hope to
18 identify an appropriate mechanism for your team to access it. . . .").

19 In sum, Birnbaum & Godkin and Gross & Klein were actively working with Mr. Kramer and Mr.
20 Scaramellino to disclose Facebook's confidential information to the media, government entities, and the
21 public. Mr. Godkin, Mr. Kruzer, and Mr. Gross actively sent or were copied on hundreds of emails with
22 third parties about Facebook's confidential information, and not once did they object to Six4Three's
23 campaign to publicize Facebook's confidential information, let alone raise potential conflicts or violations
24

25 ² *See* Order at 6, 9, 10, 14 (Nov. 1, 2018) (finding that the submission of the Godkin Declaration and its
26 3,730 pages of exhibits was "brute litigation overkill," and striking dozens of exhibits "*sua sponte*" "as
27 they do not support the propositions asserted in" Six4Three's briefing and are "irrelevant.")

28 ³ Six4Three's counsel sent a draft application for leave to file an amicus brief and a draft amicus brief to
many recipients. At least two copied significant portions without disclosing that they came from Six4Three
as required by Cal. R. Ct. 8.200(c)(3). *See, e.g.*, Kim Decl. Exs. 21–22, BG006440, BG000122-140.

1 of the California or Massachusetts Rules of Professional Conduct that would necessitate withdrawal.

2 **B. Birnbaum & Godkin and Gross & Klein Saw No Conflict When Disclosing**
3 **Facebook's Information and Litigating this Case**

4 At the same time that Birnbaum & Godkin and Gross & Klein were working with Six4Three to
5 disclose Facebook's confidential information, they had no trouble also actively litigating this case. During
6 just the period of March 2018 to November 2018, Birnbaum & Godkin and Gross & Klein opposed
7 Facebook and the Individual Defendants' anti-SLAPP motions, opposed Mr. Zuckerberg and the Ancillary
8 Defendants' demurrers to the Fifth Amended Complaint, opposed Facebook's motions to seal, coordinated
9 an amicus campaign opposing Facebook's May 30 motion to seal, moved for reconsideration of the Court's
10 order on the anti-SLAPP motions, filed an appeal of the same order, and moved for attorney's fees and
11 costs. *See, e.g.*, Reply to Def.'s Suppl. Mem. in Supp. of Its Mot. to Strike (Anti-SLAPP Prong One)
12 (March 7, 2018); Notice of Suppl. Authority (March 26, 2018); Mem. P. & A. in Opp'n to Defs.' Special
13 Mots. to Strike (Anti-SLAPP) (May 17, 2018); Mem. P. & A. in Opp'n to Ancillary Defs.' Demurrer to
14 Fifth Am. Compl. ("5AC") (May 17, 2018); Mem. P. & A. in Opp'n to Zuckerberg's Demurrer to Fifth
15 Am. Compl. (May 17, 2018); Pl.'s Opp'n to Defs.' Mot. to Seal (May 17, 2018); Pl.'s Opp'n to Facebook's
16 May 31, 2018 Mot. to Seal (June 14, 2018); Notice of Mot. and Mot. for Relief from J. Pursuant to Cal.
17 Code Civ. Proc. § 657, or in the Alternative § 663, or in the Alternative § 473 (July 31, 2018); Ex Parte
18 Appl. for Order Resetting Hr'g on Pl.'s Mot. for Relief from J. to Sept. 7, 2018 at 9:00 A.M. (Aug. 6,
19 2018); Pl.'s Suppl. Br. re: the Untimeliness of Facebook's May 31, 2018 Mot. to Seal (Aug. 15, 2018);
20 Notice of Cross-Appeal (Sept. 7, 2018); Notice of Mot. and Mot. for Attorneys' Fees and Costs in Opposing
21 Facebook's Special Mot. to Strike (Anti-SLAPP) (Sept. 21, 2018); Kim Decl. Ex. 7, BG002164 (email
22 regarding amicus); Ex. 15, BG002165 (same); Ex. 8, BG001806 (same); Ex. 9, BG002711 (same). At no
23 time did they ever suggest that they could not litigate this case due to conflicts with their client, even as
24 they engaged in the very conduct that they now claim creates a conflict.

25 **C. Now that They Fear Being Held Accountable, Birnbaum & Godkin and Gross &**
26 **Klein Suddenly See a Conflict**

27 Remarkably, it seems that Birnbaum & Godkin and Gross & Klein did not believe that their and
28 their client's massive campaign to disclose Facebook's confidential information in violation of the

1 Protective Order created an unwaivable conflict or an obligation to withdraw. They certainly never moved
2 to withdraw until the November 30 hearing, when it suddenly seemed that they might be held accountable
3 for their actions. Apparently they saw no incongruity between their interests and Six4Three's, or any duty
4 to withdraw. It was not until the November 30 hearing—when Birnbaum & Godkin and Gross & Klein
5 were first called out on these issues—that they suddenly declared that “this whole situation has created
6 serious issues for us under the rules of professional responsibility.” Hr’g Tr. at 19:6-23, 52:15-26 (Nov.
7 30, 2018). The Court denied their motion to withdraw. *Id.* at 52:19-26. Undeterred, Birnbaum & Godkin
8 moved ex parte to shorten time on a motion to withdraw, claiming an “unquestionable conflict” with
9 Six4Three, and that they were “now legally and ethically barred from providing counsel.” Birnbaum &
10 Godkin’s Ex Parte Appl. at 2-3 (Dec. 14, 2018). Birnbaum & Godkin did not identify what the conflict
11 was, how it arose, or why it prevented them from representing Six4Three. *Id.* The Court also denied this
12 ex parte application. Minute Order at 2 (Dec. 17, 2018).

13 **III. ARGUMENT**

14 **A. The Court Should Deny the Motions to Withdraw—B&G and G&K’s Claims of** 15 **Conflict Are Not Credible**

16 The Court should deny Birnbaum & Godkin and Gross & Klein’s motions to withdraw because
17 there is no plausible conflict. First, Birnbaum & Godkin and Gross & Klein have not identified the conflict
18 in sufficient (or any) detail and the Court cannot accept their claims at face value. Second, the fact that
19 Birnbaum & Godkin and Gross & Klein continue to litigate this case where it is convenient for them to do
20 so, even while claiming a conflict, shows that no conflict exists. Whether the Court conducts an in camera
21 review is immaterial; these are fundamental problems that cannot be overcome.

22 **1. Birnbaum & Godkin and Gross & Klein’s Vague Assertions of Conflict Are** 23 **Insufficient**

24 Birnbaum & Godkin and Gross & Klein fail to identify the supposed conflict that requires them to
25 withdraw. They claim that Facebook’s allegations put their interests in conflict with Six4Three’s, that
26 Facebook’s discovery requests create a conflict, and that there has been a breakdown in the attorney-client
27 relationship. Mem. P. & A. in Supp. of Birnbaum & Godkin, LLP’s Mot. to be Relieved as Counsel for
28 Plaintiff Six4Three, LLC (“BG Mot.”) at 2-3; Mem. P. & A. in Supp. of Stuart Gross’s and Gross & Klein

1 LLP's Mot. to be Relieved as Counsel for Plaintiff Six4Three, LLC ("GK Mot.") at 1-3. These vague,
2 general statements are insufficient to require withdrawal. Birnbaum & Godkin and Gross & Klein do not
3 specify what allegations have created a conflict or how those allegations have created a conflict, let alone
4 provide any support for the nonsensical contention that an *allegation* of misconduct alone creates a conflict.

5 Likewise, they do not explain how Facebook's discovery requests of Birnbaum & Godkin and
6 Gross & Klein create a conflict, or cite any authority for the proposition that seeking discovery of a party's
7 lawyer creates a conflict between the party and the lawyer. BG Mot. at 2-3; GK Mot. at 2-3. And they
8 provide no basis for the conclusory allegations that there has been a breakdown in the relationship.

9 Rather than identify a basis for their withdrawal, Birnbaum & Godkin and Gross & Klein cite two
10 cases in support of their arguments: *Aceves v. Superior Court*, 51 Cal. App. 4th 584 (1996), and *Uhl v.*
11 *Municipal Court*, 37 Cal. App. 3d 526 (1974). BG Mot. at 2-3; GK Mot. at 2-3. But neither supports
12 withdrawal here. In *Aceves*, a public defender office sought to withdraw from representation of a criminal
13 defendant due to a conflict. The public defender informed the court that the conflict was "(1) was confined
14 to [the client] and the office of the public defender, (2) did not involve threats to witnesses or third parties,
15 (3) did not relate to other cases and (4) had resulted in a complete breakdown in the attorney-client
16 relationship" 51 Cal. App. 4th at 592. Birnbaum & Godkin and Gross & Klein rely on *Aceves* for the
17 proposition that merely stating that there has been a complete breakdown in the attorney-client relationship
18 is enough for the Court to grant their motions to withdraw. BG Mot. at 2-3; GK Mot. at 2-3. But this is
19 false. In *Aceves*, it was critical that "there [was] no reason to doubt counsel's sincerity." 51 Cal. App. 4th
20 at 594. Moreover, there were additional guarantees of the public defender's seriousness:

21 [T]he trial court was not being asked to take one lawyer's word for it. It
22 had the assurance the matter had been evaluated by attorneys with different
23 levels of experience and responsibility and, were it possible, the office
24 would continue the representation. . . . [T]he fact that, if the motion is
25 granted, the events leading up to withdrawal are subject to scrutiny and, if
26 appropriate, reporting by successor counsel, makes unlikely the People's
27 assertion the motion will be used for delay or other improper purposes. In
28 sum, the procedure to a large degree contains its own checks and balances.

26 *Id.* at 594-95 (footnotes omitted).

27 Here, in contrast, Birnbaum & Godkin and Gross & Klein have provided barely any information
28 about the nature of the supposed conflicts, and the Court has every reason to doubt their sincerity.

1 Birnbaum & Godkin and Gross & Klein apparently had no issue with participating in the campaign to
2 publicize Facebook’s confidential information, and never saw any conflict between them and Six4Three
3 for months. The truthfulness of their sudden claims of conflict is suspect—if they saw no conflict between
4 Six4Three and themselves before, when they were working with Mr. Kramer and Mr. Scaramellino to
5 disclose Facebook’s confidential information, how is it that they see a conflict now? Nothing has changed
6 between March 2018, when Mr. Godkin wrote to the U.K. ICO “hoping for a mechanism” to get
7 Facebook’s confidential information to the ICO, and now, except that Birnbaum & Godkin and Gross &
8 Klein’s activities have come to light.

9 Moreover, the Court cannot and should not take Birnbaum & Godkin and Gross & Klein’s bare
10 word for the existence of a conflict or the alleged breakdown in the attorney-client relationship. Mr.
11 Godkin, Mr. Kruzer, and Mr. Gross have participated in a months-long campaign to violate the Protective
12 Order and the Court’s authority. Even worse, Mr. Godkin has made false statements to this Court in an
13 effort to avoid inquiry into the details of that campaign: at the November 30 hearing, he told the Court,
14 “[t]here have been no communications with third parties regarding Facebook’s confidential information.”
15 Hr’g Tr. at 36:8-10 (Nov. 30, 2018). When the Court subsequently ordered production of such documents
16 pursuant to stipulation, it turned out that there were in fact *more than 9,500 pages* of such documents in
17 the files of Mr. Godkin’s law firm alone. Indeed, he made this representation to the Court despite dozens
18 of emails that he personally sent (a) containing summaries of Facebook’s confidential information; and (b)
19 organizing an amicus campaign to oppose the sealing of Facebook’s confidential information. *See, e.g.,*
20 Kim Decl. Ex. 9, BG002711 (email regarding amicus); Ex. 23, BG000154 (email with summary); Ex. 3,
21 BG000156 (same); Ex. 10, BG001868 (same); Ex. 16, BG000855 (email regarding both amicus and
22 summary); Ex. 2, BG001330 (same); Ex. 1, BG001357 (same); Ex. 4, BG001825 (same); Ex. 17,
23 BG001860 (same). This situation is completely unlike *Aceves*—the Court is being asked to take Birnbaum
24 & Godkin and Gross & Klein’s word for the need to withdraw, but has no assurance that the conflict has
25 “been evaluated by attorneys with different levels of experience and responsibility” or that “were it
26 possible, the office would continue the representation.” Instead, it is entirely possible—and more than
27 reasonable to infer—that the motions to withdraw are being used “for delay or other improper purposes.”
28 *See infra* at Section III.B.

1 Uhl similarly does not support Birnbaum & Godkin and Gross & Klein's motions. In *Uhl*, there
2 was a conflict of interest between Uhl and another client represented by the public defender's office. 37
3 Cal. App. at 536. Here, Birnbaum & Godkin and Gross & Klein do not claim that they have other clients
4 whose interests conflict with Six4Three's.

5 **2. Birnbaum & Godkin and Gross & Klein's Continuing Litigation of This Case**
6 **Shows Their Claims of Conflict Are a Sham**

7 Even while Birnbaum & Godkin and Gross & Klein claim that the Rules of Professional Conduct
8 prevent them from continuing to represent Six4Three, they have been actively and voluntarily litigating
9 this case where it has been convenient to do so.

10 Birnbaum & Godkin and Gross & Klein first raised the possibility of an ethical conflict at the
11 November 30 hearing. Hr'g Tr. at 19:11-23 (Nov. 30, 2018). Yet, on December 2 and December 3, they
12 served discovery responses and objections on Six4Three's behalf. Decl. Laura Miller Supp. Mot. to
13 Reopen Disco. & to Compel (Jan. 8, 2019) ("Miller Decl.") Exs. 39-42. They then began prosecuting a
14 *new appeal* in this case—on December 26, Gross & Klein filed a notice of appeal from the Court's October
15 31 and November 1 orders sealing the ~4,000 pages of Facebook documents that Birnbaum & Godkin,
16 Gross & Klein, and Six4Three had tried to release into the public record. Notice of Appeal (Dec. 26, 2018).
17 And on January 4—just days before moving to withdraw—Gross & Klein designated the record on appeal.
18 Kim Decl. Ex. 24, Appellant's Notice Designating Record on Appeal (Jan. 4, 2019).⁴

19 At the same time, however, Birnbaum & Godkin and Gross & Klein have stopped participating in
20 the case where it suits their convenience. When Facebook sought to meet and confer about their responses
21 and objections to Mr. Kramer and Mr. Scaramellino's deposition notices and document requests, they
22 claimed that they could not do so, delaying this discovery by more than a month. Kim Decl. ¶ 30. When
23 Six4Three's reply to its motion for attorney's fees on Facebook's anti-SLAPP motion was due, Birnbaum
24 & Godkin and Gross & Klein simply did not file one, and instead moved ex parte to postpone the hearing.
25

26 ⁴ Six4Three has separate appellate counsel who is representing it in the pending appeals, Allison Ehlert
27 of Ehlert Appeals. Kim Decl. Ex. 25, Notice of Association of Counsel (Oct. 5, 2018); Ex. 26, Notice of
28 Association of Counsel (Sept. 7, 2018). If Birnbaum & Godkin and Gross & Klein believed that they
genuinely had an unwaivable conflict, then Ms. Ehlert presumably would be litigating this new appeal in
their stead.

1 Pl.'s Ex Parte Appl. for Order Continuing Hr'g Date (Jan. 7, 2019); Kim Decl. ¶ 31.

2 A lawyer does not get to pick and choose where they represent their client's interests and where
3 they do not. If Birnbaum & Godkin and Gross & Klein genuinely had an unwaivable conflict, then
4 presumably they would not be able to initiate and prosecute an appeal. The fact that they simultaneously
5 claim that an unwaivable conflict exists and continue to litigate the portions of the case that they feel like
6 shows that no such conflict exists, and that the Court should reject their assertions of conflict.

7 **3. Gross & Klein's Additional Arguments For Withdrawal Should Be Rejected**

8 Gross & Klein also claims that withdrawal is justified because Six4Three has not paid its fees and
9 Gross & Klein is merely local counsel. GK Mot. at 3-4. The Court should reject these arguments.

10 *First*, failure to pay attorney's fees is a permissive, not mandatory, ground for representation.
11 Under Rule 1.16(b)(5), a lawyer:

12 *may* withdraw from representing a client if: the client breaches a material
13 term of an agreement with, or obligation, to the lawyer relating to the
14 representation, and the lawyer has given the client a reasonable warning
after the breach that the lawyer will withdraw unless the client fulfills the
agreement or performs the obligation.

15 Cal. Rules of Prof'l Conduct, Rule 1.16(b)(5). Moreover, as with the timing of Birnbaum & Godkin and
16 Gross & Klein's motions as a whole, Gross & Klein's sudden objection to Six4Three's lack of payment
17 appears to be a convenient excuse. Mr. Gross has been representing Six4Three since March 2018, and in
18 that time, Six4Three has amassed "arrearages of tens of thousands of dollars." GK Mot. at 4. Yet Mr.
19 Gross claims that Six4Three has only paid him \$775 for filing fees. *Id.* That means Six4Three has not
20 paid Mr. Gross for any of his work over the past ten months. Yet Gross & Klein never moved to withdraw
21 on this basis before, and Mr. Gross conspicuously does not claim to have demanded payment until
22 December, after the Court indicated that it would entertain motions for terminating sanctions and contempt
23 proceedings. GK Mot. at 4. Indeed, despite Six4Three's failure to pay, Mr. Gross continues to litigate this
24 case, including by filing a notice of appeal in late December and a designation of the appellate record in
25 January. Six4Three's nonpayment of its fees should be rejected as an excuse for Gross & Klein to try to
26 escape from this case, rather than a genuine basis for withdrawal.

27 *Second*, Gross & Klein's argument that its role in this case is limited to acting as local counsel at
28 Birnbaum & Godkin's direction—and suggestion that it should thus be permitted to withdraw even more

1 permissively—should be rejected. GK Mot. at 4. Since joining the case, Mr. Gross has actively litigated
2 the case. He has argued on Six4Three’s behalf at ex parte hearings, where he was the only lawyer
3 representing Six4Three and no one from Birnbaum & Godkin was present. Kim Decl. ¶ 32. He, not
4 Birnbaum & Godkin, filed the notice of appeal of the Court’s October 31 and November 1 sealing orders,
5 and he, not Birnbaum & Godkin, designated the record on appeal. Notice of Appeal (Dec. 26, 2018); Kim
6 Decl. Ex. 24. And he was directly involved in Six4Three’s communications with the media and the
7 campaign to coordinate amicus briefs opposing Facebook’s motion to seal. *See, e.g.*, Kim Decl. Ex. 9,
8 BG002711 (email from Mr. Gross with recommendations for local counsel on the amicus briefs); Ex. 7,
9 BG002164 (email regarding media amicus); Ex. 14, BG002165 (same); Ex. 8, BG001806 (same). Indeed,
10 he was so involved that he performed services totaling “tens of thousands of dollars.” GK Mot. at 4.

11 For the same reasons that the Court should hold Birnbaum & Godkin responsible to serve as counsel
12 for Six4Three (at least until replacement counsel is on-board and up-to-speed), so too should Gross &
13 Klein continue to perform the duties they committed to perform when they undertook this engagement.

14 **B. The Court Should Deny the Motions to Withdraw—Withdrawal Will Unduly Delay**
15 **the Case and Work an Injustice**

16 The Court “has discretion to deny an attorney’s request to withdraw where such withdrawal would
17 work an injustice or cause undue delay in the proceeding.” *Mandell v. Superior Court (Goldsmith)*, 67
18 Cal. App. 3d 1, 4 (1977) (citing *People v. McCracken*, 39 Cal. 2d 336, 350 (1952); *People v. Murphy*, 35
19 Cal. App. 3d 905, 921 (1973); *People v. Collins*, 242 Cal. App. 2d 626, 636 (1966)). The Court must
20 exercise this discretion “reasonably.” *Mandell*, 67 Cal. App. 3d at 4.

21 Granting the motions to withdraw would both work an injustice and cause undue delay in the
22 proceeding. Birnbaum & Godkin and Gross & Klein’s intent to withdraw has already unduly delayed
23 Facebook and the Court’s investigation into Six4Three, Birnbaum & Godkin, and Gross & Klein’s
24 misconduct. Facebook first learned that Six4Three planned to disclose Facebook’s confidential
25 information to the U.K. government on November 19, 2018, and since then Facebook has diligently sought
26 to uncover the full scope of Six4Three, Birnbaum & Godkin, and Gross & Klein’s violations of the
27 Protective Order and the Court’s November 1 sealing order, November 20 non-disclosure order, and
28 November 27 preservation order. Kim Decl. Ex. 27, Godkin letter to Mehta re Order from Parliament

1 (Nov. 19, 2018). But nearly two months have gone by, and Six4Three, Birnbaum & Godkin, and Gross &
2 Klein have successfully stymied Facebook and the Court from investigating these violations.

3 Granting Birnbaum & Godkin and Gross & Klein's motions to withdraw would only extend the
4 delay and exacerbate the injustice. Neither Birnbaum & Godkin nor Gross & Klein have represented that
5 Six4Three has found replacement counsel. Nor have they given any indication of how long it will take
6 Six4Three to find replacement counsel. The only estimate before the Court is from a lawyer that is clear
7 he is not committed to taking the case, but purports to offer a quasi-expert opinion that it would take *three*
8 *to four months* of unpaid time just to evaluate whether to take the case. Decl. of Edward Vincent King,
9 Jr. (Jan. 8, 2019) ("King Decl.") ¶ 9. As explained below, that estimate of three to four months is meritless.
10 See *infra* at Section III.C. And months have already passed. If the Court grants the motions to withdraw
11 now, before new counsel is engaged, then the investigation of Six4Three, Birnbaum & Godkin, and Gross
12 & Klein's misconduct will drag on even longer, and the key witnesses' memories will fade. It will delay
13 any contempt proceedings against Six4Three and its counsel, or a motion for terminating and/or monetary
14 sanctions against Six4Three. In addition, the substantive motions pending before the Court—the parties'
15 cross-motions for anti-SLAPP attorney's fees, Facebook's motion to open discovery—will also be delayed
16 indefinitely. In these extraordinary circumstances, it would be reasonable and just for the Court to exercise
17 its discretion to deny Birnbaum & Godkin and Gross & Klein's motions to withdraw. Any other outcome
18 would set a dangerous precedent that lawyers can engage in widespread violations of the Court's orders
19 hand-in-hand with their clients, and then delay any investigation into that misconduct by many months
20 simply by seeking to withdraw from the case.

21 **C. Alternatively, if the Court Grants the Motions, It Should Require Six4Three to Find**
22 **New Counsel Within 14 Days**

23 In the alternative, if the Court finds that it must grant Birnbaum & Godkin and Gross & Klein's
24 motions to withdraw, the Court should require Six4Three to find new counsel within 14 days, to minimize
25 the delay and prejudice from Birnbaum & Godkin and Gross & Klein's withdrawals. Fourteen days is
26 more than sufficient time; Six4Three has already had one and a half months to search for replacement
27 counsel. Six4Three was on notice at least as of November 30 that Birnbaum & Godkin and Gross & Klein
28 would withdraw. Hr'g Tr. at 19:11-21 (Nov. 30, 2018). Everyone affiliated with Six4Three has found a

1 lawyer with remarkable alacrity—at most one week after the November 30 hearing:

- 2 • Mr. Kramer found not one, but two lawyers (Mr. Thoreen and a Washington, D.C. international
3 law firm) to represent him in less than a day. Hr’g Tr. at 56:24-57:7 (Nov. 30, 2018). He then
4 found a new lawyer (Mr. Russo) less than a week later. Kim Decl. Ex. 28, Russo letter to Judge
5 Swope at 1 (Dec. 6, 2018) (Mr. Russo began representing Mr. Kramer on Dec. 5).
- 6 • Mr. Scaramellino retained Mr. Russo within five days of the November 30 hearing. *Id.* (Mr.
7 Russo began representing Mr. Scaramellino on Dec. 5).
- 8 • Birnbaum & Godkin retained Morrison Mahoney LLP by December 5, and Murphy Pearson
9 Bradley & Feeney by December 6. Kim Decl. ¶ 33; Hr’g Tr. at 2:24-3:1 (Dec. 7, 2018) (Mr.
10 Mazzucco and Mr. Leveroni of Murphy Pearson entered the case on Dec. 6).
- 11 • Gross & Klein and Mr. Gross retained Wilson Elser Moskowitz Edelman & Dicker LLP by
12 December 7. Hr’g Tr. at 2:22-23 (Dec. 7, 2018).

13 Despite the veritable army of lawyers that have quickly stepped into this case since November 30,
14 Six4Three appears to have made no progress securing replacement counsel and appears to be in no rush to
15 do so. Rather than offer a declaration showing diligent efforts to secure new counsel, counsel for Mr.
16 Kramer and Mr. Scaramellino (Six4Three’s principal and lead investor/advisor, respectively) submitted a
17 declaration from a lawyer suggesting that it would take at least three to four months for new counsel to
18 decide whether to even take the case (and presumably another three or four months for the next prospective
19 lawyer to do his or her diligence if the first declines). The decision to submit Mr. King’s declaration, rather
20 than one from Mr. Kramer or Mr. Scaramellino attesting to efforts to secure new counsel, speaks volumes.

21 In any case, Mr. King’s estimate of “three to four months” is a gross overestimate and the Court
22 should disregard it. *First*, the declaration was not filed in support of either Birnbaum & Godkin or Gross
23 & Klein’s motions to withdraw, and thus is procedurally improper. *Second*, the declaration was created
24 by Mr. Russo’s firm, and Mr. Russo’s clients have a vested interest in delaying the engagement of
25 replacement counsel as long as possible, in the hopes of delaying the consequences of their violations of
26 the Court’s orders. *See* King Decl. at pdf p. 7 (stating that the document was created by “danielle russo
27 (drusso@computerlaw.com)”). Mr. King does not say when he was contacted about the case or whether
28 he has done anything to evaluate it, other than to sign a declaration for Mr. Russo’s firm. Nor does he

1 explain how he (as opposed to Mr. Russo's firm) could have foundation to make the statements he makes,
2 including for example his claim that Birnbaum & Godkin and Gross & Klein have "effectively already
3 withdrawn or abandoned representation of" Six4Three. King Decl. ¶ 11. *Third*, Mr. King's estimate is
4 not credible on its face. For example, in explaining why it would take months to review the record, he
5 avers that there have been eleven days of deposition that would need to be considered. But Mr. King would
6 not be able to review over half of those deposition transcripts because they have been designated
7 confidential or highly confidential by Facebook. King Decl. ¶ 4; Kim Decl. ¶ 34. He states that the docket
8 contains over 700 entries and that there have been more than a dozen hearings, but many of those docket
9 entries and hearings relate to issues that are long since moot and without any possible future relevance
10 (e.g., past scheduling issues), and many others are under seal and would not be available to him in any
11 case. King Decl. ¶¶ 3, 5. *Fourth*, and most fundamentally, two hundred hours over three to four months
12 is a facially unreasonable time to take in deciding whether to represent a client. It beggars belief that Mr.
13 King would work for free for ten percent of the year (assuming 2,000 billable hours per year) just to decide
14 whether to take on one new case. The very fact that everyone affiliated with Six4Three was able to find a
15 lawyer in a week or less shows that Mr. King's estimate of three to four months is unreasonable.

16 The Court should disregard Mr. King's declaration. Alternatively, if the Court is inclined to
17 consider it, Facebook respectfully requests the right to question Mr. King to test the veracity of the
18 statements therein and his foundation for making them. Everyone affiliated with Six4Three has been able
19 to promptly find a lawyer, despite the length of this case, its procedural history, and the sanctions issues
20 involved. Six4Three has already had ample time to find its own replacement counsel. To minimize the
21 delay and prejudice to Facebook, if the Court grants the motions, it should require Six4Three to find new
22 counsel within 14 days.

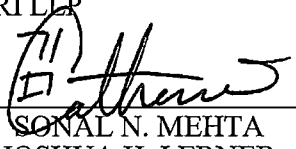
23 **IV. CONCLUSION**

24 Birnbaum & Godkin and Gross & Klein have failed to articulate a conflict that would justify
25 withdrawal, let alone where it would serve only to cause delay and work an injustice. The Court should
26 deny their motions to withdraw (at least until new counsel has been retained) and move forward with
27 pending proceedings.

1 Dated: January 17, 2019

DURIE TANGRI LLP

2
3 By: _____


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JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM

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7 Javier Olivan, Samuel Lessin, Michael Vernal, and
Ilya Sukhar
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On January 17, 2019, I served the following documents in the manner described below:

**DEFENDANT FACEBOOK, INC.'S OPPOSITION TO BIRNBAUM & GODKIN, LLP
AND GROSS & KLEIN LLP'S MOTIONS TO BE RELIEVED AS COUNSEL FOR
PLAINTIFF SIX4THREE, LLC**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jposada@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

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Attorney for Birnbaum & Godkin, LLP

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on January 17, 2019, at San Francisco, California.
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5 Jennifer Posada
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EXHIBIT 12

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10. Attorneys for Plaintiff,
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11. limited liability company
12.

13. SUPERIOR COURT OF CALIFORNIA

14. COUNTY OF SAN MATEO

15. SIX4THREE, LLC, a Delaware limited
liability company;

16. Plaintiff,

17. v.

18. FACEBOOK, INC., a Delaware
19. corporation;
MARK ZUCKERBERG, an individual;
20. CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
21. SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
22. ILYA SUKHAR, an individual; and
DOES 1 through 50, inclusive,
23.

24. Defendants.
25.
26.
27.
28.

Case No. CIV 533328

**Assigned for all purposes to
Hon. V. Raymond Swope, Dept.
23**

**OPPOSITION TO FACEBOOK'S
MOTION TO OPEN DISCOVERY
AND TO COMPEL**

Date: March 15, 2019
Time: 10:00 a.m.

Filing Date: April 10, 2015
Trial Date: April 25, 2019

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Facebook's motion to compel privileged documents and testimony should be denied because Facebook has not established a prima facie case for application of the crime-fraud exception or a reasonable relationship between the alleged crime or fraud and the attorney-client communications, or an authorized waiver of Six4Three's attorney-client privilege. Furthermore, Facebook has come nowhere close to the required showing of extreme good cause needed for leave to depose opposing counsel. For the reasons discussed below, Facebook's motion should be denied.

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1 Therefore, Facebook's motion is procedurally improper and should be denied on this
2 basis alone. See Cal. Civ. Proc. Code § 1008 (2019); *Powell v. Cty. of Orange*, 197 Cal. App.
3 4th 1573, 1577 (2011) (motion asking trial court to decide same matter previously ruled upon is
4 a motion for reconsideration under § 1008).

5 Indeed, the Individual Defendants made exactly this argument, in their August 8, 2018
6 opposition to Plaintiff's ex parte application for an order setting Plaintiffs' motion for relief
7 from judgment to September 7, 2018:

8 Six4 Three's Motion is a thinly-veiled motion for reconsideration and should be
9 treated as such. "The name of a motion is not controlling, and, regardless of the
10 name, a motion asking the trial court to decide the same matter previously ruled
11 on is a motion for reconsideration under Code of Civil Procedure section 1008."
12 *Powell v. Cty. of Orange*, 197 Cal. App. 4th 1573, 1577 (2011); accord *Lennar
13 Homes of California, Inc. v. Stephens*, 232 Cal. App. 4th 673, 681 (2014). See
14 also Cal. Prac. Guide Civ. Pro. Before Trial Ch. 9(I)—E ("The name of the
15 motion is not controlling. The [motion for reconsideration] requirements [] apply
16 to any motion that asks the judge to decide the same matter previously ruled on.")
17 (emphasis added).

18 If Six4Three seeks reconsideration of the Court's rulings on these issues as it
19 apparently seeks to do, it is incumbent on Six4Three to meet the statutory
20 requirements for such a motion. Section 1008 of California's Code of Civil
21 Procedure permits reconsideration only upon a showing of "new or different facts,
22 circumstances, or law." Cal. Civ. Proc. Code § 1008.

23 Godkin Dec., ¶4, Exh. 3 at pp. 1-2. Thus, the Individual Defendants argued, "[b]ecause
24 [Six4Three] fails to comply with the statutory requirements for a motion for reconsideration
25 under Section 1008, the Court should decline to consider Six4Three's Motion." *Id.* at p. 3.

26 Thus, Facebook's attorneys clearly know the law governing motions for reconsideration
27 but have chosen to ignore it.

28 **II. Facebook Has Not Submitted New Facts or Law Warranting
Reconsideration of the Court's Order.**

To the extent the motion to open discovery is treated as a motion for reconsideration
under Cal. Code Proc. Code § 1008, it should be denied. Facebook has not shown "new or
different facts, circumstances, or law" to warrant reconsideration of the Court's Order. Instead,
Facebook has taken a handful of quotations out of context in an attempt to spin a narrative—that

1 Six4Three and its counsel have plotted for years to reveal Facebook's confidential information,
2 notwithstanding the protective order. That story is neither true nor supported by the documents
3 Facebook cites in the motion.

4 Having been ordered by the Court to comply with Six4Three's document requests,
5 Facebook began its production of documents marked "confidential" and "highly confidential" in
6 December, 2016. Godkin Dec., ¶5. Facebook submits zero evidence of any unauthorized
7 disclosure of its confidential or highly confidential documents other than the disclosure to MP
8 Damien Collins in November 2018. Facebook's internal practices, particularly in the area of
9 privacy and treatment of user data, have been a focus of international reporting for years. Given
10 the enormous public interest in Facebook's treatment of user data, surely any "leaking" of
11 Facebook's confidential information would have been reported, but Facebook cites to no such
12 public reporting. Facebook's conspiracy theory lacks any basis in fact.

13 Furthermore, as the Court is aware, when Six4Three's counsel learned of the situation
14 involving MP Collins and the disclosure of documents subject to the protective order in
15 November 2018, counsel immediately notified Facebook and this Court. Godkin Dec., ¶6.
16 Counsel's immediate transparency further militates against Facebook's conclusion that
17 Six4Three and its counsel were engaged in a secret conspiracy to disclose Facebook's
18 confidential information in contravention of the protective order.

19 On January 7, 2019, Six4Three's counsel, as it had stipulated in open Court, produced
20 its non-privileged correspondence with media and government entities concerning Facebook's
21 Anti-SLAPP motion that Facebook had requested. Godkin Dec., ¶7. Facebook does not cite to
22 a single document or specific instance of unauthorized disclosure of any confidential
23 information to media or government entities (for example, Six4Three's opposition the anti-
24 SLAPP motion or the documents it cites). Rather, the bulk of the communications concern
25 communications with media and government entities about filing amicus briefs in opposition to
26 Facebook's motion to seal and in support of efforts to unseal Facebook's internal
27 communications. *Id.* Facebook fails to explain why the media and other parties who filed
28 amicus briefs and their counsel thought it necessary to petition the Court to permit them to

1 access documents if Facebook's documents had already been released to them. That is because
2 Facebook has no support for its conspiracy theories.

3 Lacking any actual support for its claim that the November 2018 disclosure was part of a
4 multi-year plot, Facebook selectively quotes from the produced documents in order to bolster its
5 case to open discovery. Facebook cites a summary of the Fifth Amended Complaint that was
6 sent to third parties. *See* Declaration of Laura E. Miller ("Miller Dec."), Exh. 16, BG000426-
7 000436. In the Motion, Facebook attempts to mischaracterize this document as a summary of
8 Facebook's confidential information, without providing any examples or support. *See* Motion,
9 p. 4. The summary at issue is a summary of the publicly-filed Fifth Amended Complaint, not
10 Facebook's confidential documents. The summary describes the allegations contained in the
11 complaint and cites to the paragraphs of the complaint in which those allegations are contained.
12 Godkin Dec., ¶8. The Fifth Amended Complaint has been publicly filed – without any
13 redactions – since January 12, 2018 – more than a year ago. Certainly a public document that
14 has been in the public file and publicly posted on the online docket for over one year does not
15 constitute disclosure of confidential information. Nor does it constitute a "new fact" for the
16 purposes of a motion for reconsideration under § 1008.¹

17 Facebook suggests that any communications with third parties regarding this case are
18 improper. Not true. Six4Three and its counsel were entitled to make statements to the media
19 and other third parties regarding Six4Three's claims and the allegations in the complaint, which
20 are a matter of public record. *See* Cal. Rules of Prof'l Conduct, Rule 3.6(b)(1)-(2). Six4Three
21 and its counsel were also entitled to inform media and other third parties that litigation
22 surrounding its claims was ongoing and to request assistance. *Id.* at 3.6(b)(3)-(5).

23
24
25 ¹ Additionally, counsel wrote to Facebook's counsel on November 15, 2018 explaining the non-
26 confidential basis of allegations against Facebook made by Styleform, another app developer.
27 Styleform's allegations against Facebook are nearly identical to Six4Three's. Godkin Dec., Exh.
28 4 (November 15, 2018 letter), ¶ 4. These allegations were also explained in Six4Three's
Opposition to Facebook's Ex Parte Application, filed on November 28, 2018. Godkin Dec., Exh.
5 (November 28, 2018 Opposition), ¶ 5, pp. 4-6.

1 Six4Three and its counsel were also entitled to retain consultants and experts. Again,
2 Facebook tries to spin this as something mischievous. *See* Motion, p. 2 (“so called ‘experts’
3 never disclosed by Six4Three to Facebook or to the Court....”). However, the protective order
4 expressly permitted the parties to retain consultants and experts and specified that these
5 individuals need not be disclosed to the other party. *See* Miller Dec., Exh. 11 (protective order),
6 Section 4(d) (identity of consultants or experts who have signed on to protective order shall be
7 made known to the other party “only upon good cause shown and upon order of the Court”).
8 Facebook’s speculation about consultants and experts having improper access to its confidential
9 information is completely unsupported.

10 As to Mr. Gross and Gross & Klein, in particular, Facebook’s proffered evidence of
11 “new facts” consists solely of six emails on which Mr. Gross was *copied*. *See* Miller Dec. Exhs.
12 7, 8, 15, 20, 21, 31; *compare id.* Exhs. 2, 3, 6, 12-14, 16-19, 23-30, 32, 37, 38, 48, 50. These
13 emails, furthermore, consist of: discussions between Mr. Scaramellino and representatives of
14 certain press outlets and a think tank, concerning whether documents conditionally lodged
15 under seal by Six4Three would be made public, as a result of Defendants’ delayed filing of a
16 motion to seal, and whether those entities would participate in related motion practice as amici
17 curiae (Exhs. 7, 8, 20, 21, 31); and an unresponded-to query from a press person to Messrs.
18 Kramer and Scaramellino (Exh. 15). Nowhere do Defendants identify how it is that Mr. Gross
19 being *copied* on this small handful of emails evidences any new fact that would justify the Court
20 reconsidering its order by which it denied Defendants’ request that they be given the
21 extraordinary ability to depose the attorney serving as local counsel of their adversary. Instead,
22 they rely on breathless, bald, and sweeping allegations. These allegations not only fail to satisfy
23 Civil Code of Procedure section 1008’s requirements; their statement raises concern under Civil
24 Code of Procedure Section 128.7(b).

25 **III. Facebook Has Not Filed A Noticed Motion For Terminating Sanctions or an**
26 **Application To Show Cause Re: Contempt.**

27 At the December 17, 2018 discovery conference, the Court explicitly invited Facebook,
28 if it chose to do so, to file a noticed motion for terminating sanctions pursuant to Code of Civil

1 Procedure 2023.030. Godkin Dec., Exh. 1 at 7:2-6. And the Court explicitly invited Facebook,
2 if it chose to do so, to make an application to show cause re: Contempt with a properly prepared
3 application and affidavit pursuant to Code of Civil Procedure 1211 and 1211.5. Godkin Dec.,
4 Exh. 1 at 7:7-14. Facebook has not filed a noticed motion for terminating sanctions or an
5 application to show cause re: Contempt.

6 By inviting Facebook to pursue sanctions and/or contempt, the Court has already
7 considered the proper procedures Facebook must follow if it wishes to pursue these remedies.
8 Rather than following proper procedure, Facebook chose instead to ignore the Court and file its
9 motion seeking to open discovery. Facebook's tactics should not be countenanced.

10 **IV. Facebook Fails to Establish That the Crime/Fraud Exception Applies or**
11 **That Six4Three Has Waived the Attorney/Client Privilege.**

12 Facebook half-heartedly asserts that the crime/fraud exception applies here or that
13 Six4Three has waived the attorney-client privilege. Neither argument has merit.

14 Facebook asserts that the crime/fraud exception applies based on a "coordinated effort to
15 publicize Facebook's confidential and highly confidential information in violation of this
16 Court's orders, and their subsequent efforts to cover up those violations." Motion at 11.
17 Facebook points to no evidence of publication of Facebook's confidential information other
18 than the information disclosed by Mr. Kramer to the DCMS Committee pursuant to the
19 Committee's Order. It has no evidence to support its claim that the efforts to publicize
20 Facebook's information were undertaken in anything other than strict compliance with the
21 Protective Order and this Court's sealing orders, through advocacy (including numerous amicus
22 briefs) to convince the Court that Facebook's information should be available to the public.
23 Facebook's argument on the crime/fraud exception fails because it is based on communications
24 with the media and regulatory agencies that Six4Three and its counsel were and are fully
25 entitled to pursue, as set forth above. Those lawful communications cannot form a prima facie
26 case that the crime/fraud exception applies.

27 As to Mr. Kramer's compelled disclosure of Facebook's confidential information to the
28 DCMS Committee, the Court is fully aware that there was no effort to "cover up" this

1 disclosure. To the contrary, Six4Three's counsel immediately notified Facebook and the Court
2 upon learning from Mr. Kramer what had transpired in the United Kingdom. Facebook has
3 therefore failed to establish a prima facie case that the services of counsel were obtained "to
4 enable or aid anyone to commit or plan to commit a crime or a fraud." *State Farm & Cas. Co.*
5 *v. Superior Court (Taylor)*, 54 Cal. App. 4th 625, 643 (1997), *as modified* (May 1, 1997).
6 Facebook also fails to establish the second prong required for application of the exception: "a
7 reasonable relationship between the fraud and the attorney-client communication." *State Comp.*
8 *Ins. Fund v. Superior Court*, (2001) 91 Cal. App. 4th 1080 (citations omitted).²

9 As to waiver, Facebook points to no examples of communication of privileged material
10 to a third party. Six4Three's counsel of record is ethically bound by applicable rules of
11 professional conduct in California and Massachusetts to safeguard Six4Three's privileged
12 communications. The privilege belongs to Six4Three, not to its counsel. Six4Three's counsel
13 has no authority to waive Six4Three's attorney-client privilege. Godkin Dec., ¶11. Because
14 there has been no authorized waiver of the privilege, Facebook is not entitled to the discovery it
15 seeks of communications protected by privilege.

16 **V. Facebook Fails to Clear the High Bar Against Taking the Deposition of**
17 **Opposing Counsel of an Adversary.**

18 While for the foregoing reasons, Facebook's motion should be denied in its entirety, the
19 portion requesting leave to depose Messrs. Godkin and Gross should further be denied based on
20 Facebook's failure to meet its burden to show extremely good cause for such leave.

21 "[The] practice of taking the deposition of opposing counsel should be severely
22 restricted, and permitted only upon showing of extremely good cause." *Spectra-Physics, Inc. v.*

23
24 ² In California, the crime-fraud exception only extends to communications "reasonably related to
25 the fraud"; it does not "result in a wholesale waiver of the attorney-client privilege."
26 *Cunningham v. Conn. Mut. Life Ins.*, (S.D. Cal. 1994) 845 F. Supp. 1403, 1415. Further, EC 956
27 applies only to attorney-client privilege. It does not apply to information protected by work
28 product immunity. *State Farm and Casualty Co. v. Superior Court* (1997) 54 Cal. App. 4th 625,
650; *BP Alaska Exploration Inc. v. Superior Court*, (1988) 199 Cal. App. 3d 1240, 1250-51.
Even if the Court were inclined to rule that the crime/fraud exception applies here, Facebook's
broad requests for relief in its motion cannot be granted without a thorough analysis of
communications to determine if the exception applies.

1 *Superior Court*, 198 Cal. App. 3d 1487, 1494 (1988) (quoting *Fireman's Fund Ins. Co. v.*
2 *Superior Court* 72 Cal.App.3d 786, 790 (1977)). "The circumstances under which opposing
3 counsel may be deposed are limited to those where (1) no other means exist to obtain the
4 information than to depose opposing counsel; (2) the information sought is relevant and not
5 privileged; (3) the information is crucial to the preparation of the case." *Id.* at 1496.

6 First, there are obvious other means to obtain the information that Facebook claims to
7 seek, to wit whether its confidential information has been disclosed to the press or a
8 government agency with whom Six4Three was in contact. If it truly believes that such an event
9 has occurred—despite no evidence of such a disclosure—it can depose the press and
10 governmental representatives.

11 Second, as discussed in Section IV, the testimony that would be sought from Messrs.
12 Godkin and Gross would be privileged. Moreover, it would have no relevance to anything other
13 than a motion for sanctions or contempt, concerning which, as discussed in Section III above,
14 this Court already has recognized Facebook has what it needs.

15 Third and relatedly, no testimony by Messrs. Godkin or Gross is anywhere close to
16 crucial to the preparation of Facebook's case. Neither Messrs. Godkin nor Gross are percipient
17 witnesses of any events underlying the merits of the claims and defenses in this action; and, as
18 Facebook already has what it needs should it wish to bring a motion for sanctions or contempt.
19 Thus, far from "crucial" to the preparation of Facebook's case on either the merits or any
20 motion for sanctions or contempt, the depositions of Messrs. Godkin and Gross are wholly
21 unnecessary. Rather, Facebook's purpose in seeking to take their depositions is, most charitably,
22 to harass and punish attorneys whose client has admitted to disclosing its confidential
23 information. Such a desire does not constitute extreme good cause.

24 CONCLUSION

25 Facebook's motion to open discovery has already been considered and denied by this
26 Court. There are no new facts or law which justify reconsideration of the Court's Order
27 concerning this request. Facebook's motion to open discovery should be denied. Facebook's
28

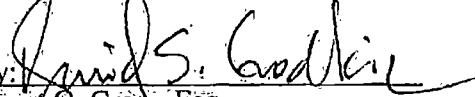
1 motion to compel should also be denied because Facebook has failed to establish a prima facie
2 case that the crime-fraud exception applies or that it seeks communications that are reasonably
3 related to the alleged crime or fraud, and finally because Facebook has failed to establish an
4 authorized waiver of the privilege. Furthermore, Facebook has come nowhere close to the
5 required showing of extreme good cause needed to for leave to depose opposing counsel.

6
7 Dated: February 27, 2019

Respectfully Submitted,

8 GROSS & KLEIN LLP

9 BIRNBAUM & GODKIN, LLP

10 By: 
11 Stuart Q. Gross, Esq.

12 David S. Godkin (admitted *pro hac vice*)

13 James E. Kruzer (admitted *pro hac vice*)

14 Attorneys for Plaintiff Six4Three, LLC
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1 **PROOF OF SERVICE**

2 I, Cheryl A. McDuffee, declare:

3 I am a citizen of the United States and employed in Suffolk County, Massachusetts. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business
5 address is 280 Summer Street, Boston, MA 02210. On February 27, 2019, I served a copy of
6 the within document(s):

7 **OPPOSITION TO FACEBOOK'S MOTION TO OPEN DISCOVERY AND TO
8 COMPEL**



by electronic service, per the agreement of the parties, by emailing a true
and correct copy through counsel's email address to all counsel of record
at the email addresses set forth below.

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26 Cox, Javier Olivan, Samuel Lessin,
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*Attorneys for Theodore Kramer and
Thomas Scaramellino*

1 **BY EMAIL AND BY HAND**

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4 complexcivil@sanmateocourt.org
5 rhuerta@sanmateocourt.org

6 I declare under penalty of perjury under the laws of the State of California that the above
7 is true and correct.

8 Executed February 27, 2019, at Boston, Massachusetts.

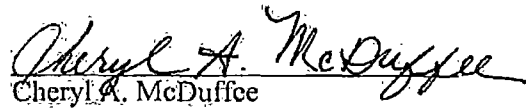
9 
10 Cheryl A. McDuffee
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EXHIBIT 13

88 Kearny Street, Suite 1000
San Francisco, CA 94108
Telephone 415-788-1900
Facsimile 415-393-8087

May 2, 2019

VIA E-MAIL

The Honorable V. Raymond Swope, III
Superior Court of California, County of San Mateo
Department 23, Courtroom 8A
400 County Center
Redwood City, CA 94063

**Re: Discovery Letter Brief re: May 3, 2019 Conference in *Six4Three, LLC*
v. Facebook, Inc. et al., CIV-533328**

Your Honor:

This letter brief is submitted on behalf of non-party Birnbaum & Godkin, LLP and David S. Godkin ("B&G"). At the outset, B&G objects to the scheduling of a discovery conference tomorrow on two days' notice, and the Court's order to submit a discovery letter brief on less than one day's notice. As set forth in the objection submitted yesterday, this is not in compliance with Case Management Order No. 1 and does not provide sufficient notice to B&G.

In addition, B&G requests leave to file an ex parte application to stay discovery until Plaintiff Six4Three LLC engages new counsel. Per the Court's Orders granting the motions to be relieved as counsel, the Court has scheduled a Case Management Conference for June 28, 2019 to address the status of Six4Three's retention of new counsel. Six4Three is presently not represented by counsel, and therefore has not counsel to represent its interests at the discovery conference set for tomorrow. As Six4Three's former counsel, B&G submits that no further proceedings should go forward until Six4Three has new counsel, or, if Six4Three is unable to engage new counsel, the Court addresses Six4Three's ability to continue to pursue this litigation.

Accordingly, B&G requests that the Court take the discovery conference off calendar and grant leave for B&G to file an ex parte application to stay discovery until Six4Three has new counsel in place.

To the extent that the Court declines to take the discovery conference off calendar, B&G responds as follows to Facebook's April 19, 2019 discovery letter.

Counsel for Facebook has misrepresented to this Court what was stated regarding document production¹ during the Massachusetts Superior Court Rule 9C telephone conference which occurred on April 19, 2019.²

At issue were objections made to a subpoena issued by a Massachusetts attorney, in a Massachusetts action, pursuant to the order of a Massachusetts judge. The objections addressed both the substance of the requests and the form thereof. At no time was counsel for Facebook told to “pound sand” or any other such colorful expression. Rather, counsel for Facebook was told what materials would be produced, what materials would not, the reasons therefore, and the actions that were being taken to ensure that the matter would be properly presented to the courts. The absence of such explanation to this Court is indicative of the fact that counsel for Facebook was not interested in conducting a Rule 9C conference (nor was she interested in letting the Massachusetts attorney who issue the subpoena do so), and would not consider any response other than a waiver of all objections by Massachusetts counsel for Godkin.

Counsel for Godkin advised counsel for Facebook that after this Court’s Case Management Order #21, the managing member for 643, Mr. Kramer, expressly directed Godkin not to produce any further documents. Counsel for Mr. Kramer was also present on the telephone conference (to which counsel for Facebook objected), and confirmed that 643 was not agreeing to any waiver of its attorney-client privilege or work product protections. Accordingly, counsel for Godkin explained that because of this express directive, because 643 had not had the opportunity to have counsel not subject to conflict address this Court’s order regarding waiver of privilege, and because Massachusetts counsel was advised that the procedures for seeking reconsideration or appeal of the order allowing such discovery was underway in California, no attorney-client privileged materials would be produced until that issue was further addressed by the courts. However, counsel for Godkin did indicate what was being done in anticipation of such further proceedings.

Counsel for Godkin noted that this Court had expressly indicated that materials which are subject to work product protection were not immediately subject to production pursuant to the subpoenas it authorized. Counsel for Godkin advised that his office was undertaking a review of all Birnbaum

¹ With regard to the notice of deposition for testimony, California counsel for Facebook asserts that such was proper as she had advised California counsel for Godkin that this was merely a “placeholder” in the event this Court authorized such a deposition. However, there is no provision in Massachusetts law for issuing a “placeholder” subpoena and no request was made of Massachusetts counsel for Godkin to agree to a subpoena merely to hold a date for deposition. Moreover, the Massachusetts Court permitting the subpoena to be issued was not informed that such a deposition had not already been authorized by this Court. Accordingly, the subpoena issued compelled appearance and testimony by Godkin on a specified date and time which expressly has not been authorized by this Court.

² Because counsel for Facebook indicated that the only date and time it could undertake this call before the then-anticipated April 26 discovery conference was April 19, which was Good Friday and the first night of Passover, Massachusetts counsel for Godkin took the call while travelling. Despite being told that he was not in the office and would not have access to his office computer that day, counsel for Facebook insisted that counsel for Godkin provided certain information immediately. Counsel for Godkin was told that this simply was not possible because he was in a car. Counsel for Facebook has since tried to miscast this exchange as being a refusal by counsel for Godkin.

& Godkin LLP communications in the Facebook case to identify both privileged and non-privileged/protected exchanges which related to Facebook's confidential/highly confidential materials. He further advised that any non-privileged communications which had not already been produced would be provided. Any privileged/protected materials would be identified in a privilege log meeting the requirements of Massachusetts law. However, given the breadth of the subpoena issued, this would require individual review of literally tens of thousands of pages of materials (as there is no electronic search which would sufficiently cover all electronic exchanges and there were separate paper communications which would have to be reviewed). As such, this would take some time to complete.

In addition to the objections noted above, the following objections remain regarding the six individual requests for production of documents directed at Godkin:

Objection to Request for Production No. 1

Opposing counsel's request for phone logs and "ALL telephonic and/or video conference communications" is objectionable on several grounds. Godkin objects to this request in that it is vague (not defining who Facebook considers to be "agents" or "representatives" of Six4Three, and not defining what Facebook considers to be a "phone log"), overly broad (seeking materials unrelated to the disclosure of confidential Facebook information and therefore beyond the scope of the California Superior Court's orders), unduly burdensome (as it requires Godkin to provide materials which are not in his care, custody, or control), and seeks to infringe on the attorney client privilege and work product doctrine. Further, Godkin objects to this request on the ground that it is unlimited by time frame and is therefore overly broad and unduly burdensome.

Objection to Request for Production No. 2

Opposing counsel's request for "all communications between Six4Three" and a list of both identified and unidentified parties is objectionable on several grounds. Godkin objects to this request in that it is vague (not defining who Facebook considers to be "agents" or "representative" of Six4Three), overly broad (seeking materials unrelated to the disclosure of confidential Facebook information and therefore beyond the scope of the California Superior Court's orders), unduly burdensome (as it requires Godkin to provide materials which are not in his care, custody, or control), and seeks to infringe on the attorney client privilege and work product doctrine. Godkin objects to this request on the ground that it is unlimited by time frame and is therefore overly broad and unduly burdensome. Further, all non-privileged responsive documents in Godkin's care, custody, or control have previously been produced.

Objection to Request for Production No. 3

Opposing counsel's request for Godkin to produce "documents sufficient to show the identity" of individuals and entities with whom the anti-SLAPP motion was discussed is objectionable on several grounds. Godkin objects to this request in that it is vague (not defining who Facebook considers to be "agents" or "representatives" of Six4Three), overly broad (seeking materials unrelated to the disclosure of confidential Facebook information and therefore beyond the scope

of the California Superior Court's orders), unduly burdensome (as it requires Godkin to provide materials which are not in his care, custody, or control), and seeks to infringe on the attorney client privilege and work product doctrine. Godkin objects to this request on the ground that it is unlimited by time frame and is therefore overly broad and unduly burdensome.

Objection to Request for Production No. 4

Opposing counsel's request for Godkin to produce "ALL emails and attachments exchanged between Mr. Kramer and Damian Collins, or ANY member or employee of the DCMS Committee of the U.K. Parliament" is objectionable on several grounds. Godkin objects to this request in that it is vague (not defining who Facebook considers to be "agents" or "representatives" of Six4Three), overly broad (seeking materials unrelated to the disclosure of confidential Facebook information and therefore beyond the scope of the California Superior Court's orders), unduly burdensome (as it requires Godkin to provide materials which are not in his care, custody, or control), and seeks to infringe on the attorney client privilege and work product doctrine. Godkin objects to this request on the ground that it is unlimited by time frame and is therefore overly broad and unduly burdensome. Further, all non-privileged responsive documents in Godkin's care, custody, or control have previously been produced.

Objection to Request for Production No. 5

Opposing counsel's request for Godkin to produce records that were in Mr. Kramer's possession is objectionable on several grounds. Godkin objects to this request in that it is overly broad (seeking materials unrelated to the disclosure of confidential Facebook information and therefore beyond the scope of the Court's orders), unduly burdensome (as it requires Godkin to provide materials which are not in his care, custody, or control), and seeks to infringe on the attorney client privilege and work product doctrine.

Objection to Request for Production No. 6

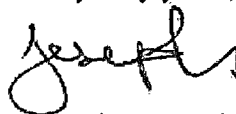
Opposing counsel's request for Godkin to produce such communications regarding the anti-SLAPP motion is objectionable on several grounds. Godkin objects to this request in that it is vague (not defining who Facebook considers to be "agents" of or "individual associated" with Six4Three), overly broad (seeking materials unrelated to the disclosure of confidential Facebook information and therefore beyond the scope of the Court's orders), unduly burdensome (as it requires Godkin to provide materials which are not in his care, custody, or control), and seeks to infringe on the attorney client privilege and work product doctrine.

As stated previously, Godkin objects generally to the Document Subpoena it seeks production of privileged communications.

Counsel for Birnbaum & Godkin, LLP maintains the above objections as well as the objection to the court's setting of this discovery conference on May 3, 2019 in violation of Case Management Order No. 1.

Six4Three, LLC v. Facebook, Inc.
May 2, 2019
Page 5

Very truly yours,

A handwritten signature in black ink, appearing to read "Joseph", with a stylized flourish at the end.

Joseph Leveroni

TMS.3422489.docx

EXHIBIT 14

From: ComplexCivil
To: Margaret Ann Franz; ComplexCivil; Rebecca Huerta; sgross@grosskleinlaw.com; godkin@birnbaumgodkin.com; irusso@computerlaw.com; csargent@computerlaw.com; kruzer@birnbaumgodkin.com; donald.sullivan@wilsonelser.com; Joyce.Vialpando@wilsonelser.com; Dea.Palumbo@wilsonelser.com; JMurphy@MPBF.com; jlassart@mpbf.com; TMazucco@MPBF.com; JLeveroni@MPBF.com; Catherine Kim
Cc: ComplexCivil
Subject: Six4Three v. Facebook (CIV533328) - Continuance of Discovery Conference / Setting Ex Parte and CMC / Compliance with Amended Order, issued 11/01/18
Date: Thursday, May 2, 2019 2:08:55 PM

Counsel,

In light of Birnbaum & Godkin's request for an ex parte application to stay discovery, the discovery conference is continued, *sua sponte*, from Friday, May 3, 2019 to **Friday, May 10, 2019 at 9 a.m.** in Department 23. The ex parte application shall be considered on the same date and time.

Birnbaum & Godkin shall file and electronically serve its ex parte application no later than Monday, May 3, 2019 at 9 a.m. Any response shall be filed and electronically served no later than Wednesday, May 7, 2019 at 9 a.m. No reply is permitted. Per CM Order no. 1, paragraph 4, ex parte applications and oppositions must be filed in hardcopy paper.

As previously noted, neither S. Bolotin nor L. Lombard of Morrison & Mahoney, LLP has appeared in this action by filing a Notice of Association or substitution of counsel, and Birnbaum & Godkin, LLP continues to be represented by Murphy Pearson Bradley & Feeney. Neither Bolotin nor Lombard is a California-licensed attorney or has applied to be admitted *pro hac vice* in this action. Accordingly, it would be improper for the Court to communicate directly with counsel who have not appeared in this action on behalf of Birnbaum & Godkin, LLP or are not authorized to practice law in the State of California.

It has come to the Court's attention that the parties may not have complied with AMENDED ORDER ON: (1) FACEBOOK'S MOTIONS TO SEAL, FILED JANUARY 8 AND MAY 3 AND 30; (2) THE GUARDIAN AND CNN'S MOTION TO UNSEAL JUDICIAL RECORDS; AND (3) THE NEW YORK TIMES, ASSOCIATED PRESS, AND WASHINGTON POST'S MOTION TO UNSEAL, issued on November 1, 2018. Specifically,

In the interest of judicial economy, Facebook and Six4Three shall coordinate to pull the documents lodged provisionally under seal on May 17, 2018 and have now been ordered to be filed in Section 5(e)(6)-(7) of this Order. Six4Three shall file a revised declaration attaching these documents with Clerk of the Court.

(Am. Order, issued Nov. 1, 2018, p. 15:14-17.) A review of the docket reflects the revised declaration of David Godkin has not been filed. If this finding is in error, please

advise of the date of filing and send an electronic courtesy copy of the revised declaration.

If this is not in error, it has been over six months since the issuance of this order, and the parties have not complied with this order. The time for compliance with this order is stale. **The parties and former counsel for Six4Three, LLC shall address this issue and how to resolve it in light of the withdrawal orders at a Case Management Conference set for May 10, 2019 at 9 a.m.**

EXHIBIT 15

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): Donald Sullivan SBN 191080 Wilson Elser Moskowitz Edelman & Dicker LLP 525 Market Street, 17th Floor San Francisco, California 94105 TELEPHONE NO.: 415-433-0990 FAX NO.: 415-434-1370 ATTORNEY FOR (Name): Attorneys for Plaintiff Stuart Gross and Gross & Klein		FOR COURT USE ONLY
NAME OF COURT: San Mateo Superior Court STREET ADDRESS: 400 County Center MAILING ADDRESS: CITY AND ZIP CODE: Redwood City, California 94063 BRANCH NAME: Southern Court		
CASE NAME: Six4Three, LLC v. Facebook, Inc., et al.		CASE NUMBER: CIV533328
NOTICE OF MOTION AND MOTION TO BE RELIEVED AS COUNSEL—CIVIL		HEARING DATE: February 7, 2019 DEPT.: 23 TIME: 9:00 a.m. BEFORE HON.: V. Raymond Swope DATE ACTION FILED: TRIAL DATE:

TO (name and address of client): **Six4Three, LLC**
1267 Chestnut St., Apt. 6, San Francisco, California 94109

- PLEASE TAKE NOTICE that (name of withdrawing attorney): **Stuart Gross an Gross & Klein LLP** moves under California Code of Civil Procedure section 284(2) and California Rules of Court, rule 3.1362, for an order permitting the attorney to be relieved as attorney of record in this action or proceeding.
- A hearing on this motion to be relieved as counsel will be held as follows:

a.	Date: February 7, 20189	Time: 9:00 a.m.	Dept.: 23	Room:
----	--------------------------------	------------------------	------------------	-------

b. The address of the court: ☐ same as noted above ☐ other (specify):

- This motion is supported by the accompanying declaration, the papers and records filed in this action or proceeding, and the following additional documents or evidence (specify):
 - Memorandum of Points and Authorities In Support of Stuart Gross' and Gross & Klein's Motion to Be Relieved as Counsel for Plaintiff
 - Declaration of Stuart Gross In Support Thereof
 - [Proposed] Order Granting Motion to Be Relieved As Counsel for Six4Three LLC

(This motion does not need to be accompanied by a memorandum of points and authorities. Cal. Rules of Court, rule 3.1362.)

- The client presently represented by the attorney is

a. <input type="checkbox"/> an individual.	g. <input type="checkbox"/> a trustee.
b. <input checked="" type="checkbox"/> a corporation.	h. <input type="checkbox"/> a personal representative.
c. <input type="checkbox"/> a partnership.	i. <input type="checkbox"/> a probate fiduciary.
d. <input type="checkbox"/> an unincorporated association.	j. <input type="checkbox"/> a guardian ad litem.
e. <input type="checkbox"/> a guardian.	k. <input type="checkbox"/> other (specify):
f. <input type="checkbox"/> a conservator.	

(Continued on reverse)

Page 1 of 2

CASE NAME: Six4Three, LLC v. Facebook, Inc., et al.	CASE NUMBER: CIV533328
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NOTICE TO CLIENT

If this motion to be relieved as counsel is granted, your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

5. If this motion is granted and a client is representing himself or herself, the client will be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

If this motion to be relieved as counsel is granted, you will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

6. If this motion is granted, the client must keep the court informed of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

If this motion to be relieved as counsel is granted, the court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

Date: January 9, 2018

Donald Sullivan

(TYPE OR PRINT NAME)

► 
(SIGNATURE OF ATTORNEY)

Attorney for (name):

EXHIBIT 16

1. PLEASE TAKE NOTICE that *(name of withdrawing attorney):* Birnbaum & Godkin, LLP moves under California Code of Civil Procedure section 284(2) and California Rules of Court, rule 3.1362, for an order permitting the attorney to be relieved as attorney of record in this action or proceeding.

a.	Date: February 7, 2019	Time: 9:00 A.M.	Dept.: 23	Room:
----	-------------------------------	------------------------	------------------	-------

3. This motion is supported by the accompanying declaration, the papers and records filed in this action or proceeding, and the following additional documents or evidence (*specify*):

1. **Memorandum of Points and Authorities In Support of Birnbaum & Godkin, LLP's Motion to be Relieved as Counsel for Plaintiff Six4Three, LLC**
2. **[Proposed] Order Granting Motion to be Relieved as Counsel for Plaintiff Six4Three, LLC**

4. The client presently represented by the attorney is

a. <input type="checkbox"/> an individual.	g. <input type="checkbox"/> a trustee.
b. <input checked="" type="checkbox"/> a corporation.	h. <input type="checkbox"/> a personal representative.
c. <input type="checkbox"/> a partnership.	i. <input type="checkbox"/> a probate fiduciary.
d. <input type="checkbox"/> an unincorporated association.	j. <input type="checkbox"/> a guardian ad litem.
e. <input type="checkbox"/> a guardian.	k. <input type="checkbox"/> other (specify):
f. <input type="checkbox"/> a conservator.	

Page 1 of 2
Code of Civil Procedure, § 284;
Cal. Rules of Court, rule 3.1362
www.courtinfo.ca.gov

CASE NAME:

Six4Three, LLC v. Facebook, Inc. et al.

CASE NUMBER:

CIV533328

NOTICE TO CLIENT

If this motion to be relieved as counsel is granted, your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

5. If this motion is granted and a client is representing himself or herself, the client will be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

If this motion to be relieved as counsel is granted, you will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

6. If this motion is granted, the client must keep the court informed of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

If this motion to be relieved as counsel is granted, the court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

Date:

David Godkin/ Joseph Leveroni

(TYPE OR PRINT NAME)



(SIGNATURE OF ATTORNEY)

Attorney for (name): Birnbaum & Godkin, LLP

EXHIBIT 17

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):		FOR COURT USE ONLY	
TELEPHONE NO.: E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):		ENDORSED FILED SAN MATEO COUNTY APR 30 2019 Clerk of the Superior Court By <u>R. Huerta</u> DEPUTY CLERK	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo STREET ADDRESS: 400 County Center MAILING ADDRESS: CITY AND ZIP CODE: Redwood City, CA 94063 BRANCH NAME: Southern Branch		CASE NUMBER: CIV533328	
CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.		HEARING DATE: March 13, 2019 DEPT.: 23 TIME: 9:00 a.m. BEFORE HON.: V. Raymond Swope DATE ACTION FILED: April 10, 2015 TRIAL DATE: Not set	
ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL			

- The motion of (name of attorney): Birnbaum & Godkin, LLP
to be relieved as counsel of record for (name of client): Six4Three, LLC
a party to this action or proceeding, came on regularly for hearing at the date, time, and place indicated above.
- The following persons were present at the hearing:
See Attachment 2.

FINDINGS

- Attorney has
 - ☐ personally served the client with papers in support of this motion.
 - ☐ served client by mail and submitted a declaration establishing that the service requirements of California Rules of Court, rule 3.1362, have been satisfied. **SEE ATTACHMENT 3**
- Attorney has shown sufficient reasons why the motion to be relieved as counsel should be granted and why the attorney has brought a motion under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1).

ORDER

- Attorney is relieved as counsel of record for client
 - ☐ effective upon the filing of the proof of service of this signed order upon the client.
 - ☐ effective on (specify date):
- The client's ☒ current ☐ last known address and telephone number:
Six4Three, LLC
1267 Chestnut Street, Apt. 6, San Francisco, CA 94109

If the client's current address is known, service on the client must hereafter be made at that address unless otherwise ordered in item 13. If the current address is not known, service must be made according to Code of Civil Procedure section 1011 (b) and rule 3.252 of the California Rules of Court.

- The next scheduled hearing in this action or proceeding is set for (date, time, and place):
May 3, 2019 at 2:00 p.m. at 400 County Center, Department 23, Redwood City, CA 94063 ("Dept. 23")
- The hearing will concern (subject matter):
Motions to Seal

NOTICE TO CLIENT

You or your new attorney, if any, must prepare for and attend this hearing.

Page 1 of 2

CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.	CASE NUMBER: CIV533328
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8. The following additional hearings and other proceedings (including discovery matters) are set in this action (describe the date, time, place, and subject matter of each):
Motion to Seal set for July 19, 2019 at 2:00 p.m. in Dept. 23

9. The trial in this action or proceeding:

- a. ☒ is not yet set.
b. ☐ is set for (specify date, time, and place):

10. Client is hereby notified of the following effects this order may have upon parties.

NOTICE TO CLIENT

Your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

11. Client is notified that, if the client will be representing himself or herself, the client shall be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

You will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

12. Client is notified that it is the client's duty to keep the court informed at all times of the client's current address.


NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

The court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

13. The court further orders (specify):

See Attachment 13.

Date: APR 29 2019


JUDGE OR JUDICIAL OFFICER

Attachment 2



SUPERIOR COURT OF SAN MATEO COUNTY
400 County Center 1050 Mission Road
Redwood City, CA 94063 South San Francisco, CA 94080
www.sanmateocourt.org

Minute Order

**SIX4THREE, LLC, A DELAWARE LIMITED LIABILITY COMPANY vs.
FACEBOOK, INC, A DELAWARE CORPORATION, et. al.**

CIV533328

03/13/2019 9:00 AM
Motion to be Relieved as
Counsel
Hearing Result: Held.

Judicial Officer: Swope, V. Raymond
Courtroom Clerk: Rebecca Huerta

Location: Courtroom 8A
Courtroom Reporter: Geraldine Vandeveld

Parties Present

GODKIN, DAVID S.	Attorney
GROSS, STUART G	Attorney
KIM, CATHERINE Y.	Attorney
LERNER, JOSHUA H	Attorney
MEHTA, SONAL N	Attorney
MILLER, LAURA E.	Attorney
RUSSO, JACK.	Attorney

Exhibits

Minutes

Journals

- At 9:12 a.m.- Court convenes.

Also present JAMES MURPHY & JAMES LASSART appeared with and for David Godkin and Birnbaum & Godkin.

Also present DONALD SULLIVAN appeared with Stuart G Gross.

Also present NATALIE NAGLE in house counsel for Facebook, et al.

Also present JACK RUSSO on behalf of Third Party Theodore Kramer & Thomas Scaramellino.

Also present: ZACHARY ABRAHMSON on behalf of Facebook, et al.

The Court announces it will conduct an in camera review with Mr. Godkin, Mr. Gross, Mr. Kramer and Mr. Scaramellino. Also, Court states it will not ask questions that maybe incriminating or needing to assert 5th amendment.

Furthermore, the Court after in camera hearing shall have the proceedings sealed.

Mr Russo objects and requests to be present at the in-camera hearing. The Court denies Mr. Russo's request.

All counsel, parties and public are ordered to vacate the courtroom.

At 9:19 a.m. - Court recess.

At 9:27 a.m. - Court reconvenes.

This portion of the hearing is closed to all parties, counsel and public except for the people mentioned below:

Parties present Mr. Gross, Mr. Godkin, Mr. Kramer and Mr. Scaramelino. No other counsel, parties or public are present.

At 9:28 a.m. - Parties are sworn.

The Court asks Mr. Kramer a question.

Mr. Kramer will not waive attorney/client privilege.

At 9:32 a.m. - Hearing is concluded.

At 9:32 a.m. - Court recesses.

At 9:42 a.m. - Court reconvenes. Above-noted counsel and parties present.

This portion of the hearing is open to be public.

The Court returns Mr. Gross his retainer agreement.

The court finds there is no conflict between attorney and clients and without further evidence.

MOTION TO WITHDRAW AS ATTORNEY OF RECORD is DENIED without prejudice.

The Court informs parties motion to be heard on Friday shall proceed.

Further, the Court orders Mr. Godkin to file a notice of errata as to Declaration of David S. Godkin in support of Plaintiff's motion for attorneys fees and costs missing exhibits. Said notice of errata shall be filed by today at the end of business day.

At 9:53 a.m. - Parties argue as to the tentative ruling.

At 10:39 a.m. - Arguments are concluded.

Having considered the submitted matter, the court rules as follows:

The Court vacates its previous tentative ruling and shall take the matter under submission.

Friday's hearing shall go forward.

Mr. Godkin may appear telephonically.

The Court orders Mr. Frizzora and Mr. Dehaney to file a declaration in regards to documents.

At 10:41 a.m. - Court adjourned.

Case Events

- Matter Taken Under Submission; Due: June 11, 2019; Matter under submission: MOTION TO WITHDRAW AS COUNSEL OF RECORD

Judicial officer:

Others

Comments:

Future Hearings and Vacated Hearings:

March 13, 2019 9:00 AM Motion to be Relieved as Counsel
Vandeveld, Geraldine

Swope, V. Raymond
Huerta, Rebecca
Courtroom 8A

March 15, 2019 10:00 AM Motion to Seal
Swope, V. Raymond

March 15, 2019 10:00 AM Motion to Compel
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Complex Case Status Conference
Swope, V. Raymond

Canceled: April 18, 2019 9:00 AM Pretrial hearing
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Canceled: April 25, 2019 9:00 AM Jury Trial
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Attachment 3

Attachment 3

Mr. Godkin failed to comply with California Rules of Court, rule 3.1362(d)(1) and (2). (See Godkin Dec., filed Jan. 8, 2019, ¶ 3.)

On January 24, 2019, CEO and Managing Member of Plaintiff SIX4THREE, LLC Theodore Kramer filed a declaration regarding this motion acknowledging receipt of Birnbaum & Godkin's Motion to be Relieved as Counsel. On March 13, 2019, Mr. Kramer appeared at the hearing on this motion.

Based on the foregoing, the Court finds that Birnbaum & Godkin properly effectuated service of this motion on its client Plaintiff SIX4THREE, LLC.

Attachment 13

Attachment 13

The Court FURTHER ORDERS:

(1) Notwithstanding being relieved as counsel and Stipulated Protective Order, issued October 24, 2016, paragraph 11, Plaintiff SIX4THREE, LLC's counsel Stuart Gross and David Godkin and their respective firms, Gross & Klein, LLP and Birnbaum & Godkin, LLP (collectively "Plaintiff's Counsel"), shall take any and all measures to maintain and preserve in their possession, custody, and/or control any and all records (and/or copies thereof as discussed in Paragraph 3, *infra*), including but not limited to "[c]lient materials and property" as defined in California Rules of Professional Conduct, rule 1.16(e)(1) ("Rule 1.16") and any other communications, discovery, documents, notes, reports, memoranda and/or files, whether in tangible, electronic or other form, relating in any way to this action (collectively "Six4Three File") **until further order of the Court.** (See Kramer Dec. re: Motions to be Relieved as Counsel, filed Jan. 24, 2019, ¶ 17 ("Kramer Dec.").)

(2) Except those portions that have been either publicly filed or unsealed by the Court in this action, Plaintiff's Counsel shall not release any "[c]lient materials and property" pursuant to Rule 1.16(e)(1) to Plaintiff SIX4THREE, LLC ("Plaintiff") that contain, in any way, Defendant FACEBOOK, INC.'s confidential or highly confidential information and/or documents obtained pursuant to the Stipulated Protective Order **to any person and/or entity other than Plaintiff's new counsel.** Plaintiff's new counsel shall comply with the Stipulated Protective Order.

(3) Prior to any release of the "[c]lient materials and property" in accordance with Rule 1.16(e)(1), Plaintiff's Counsel shall make, maintain and preserve a copy of the Six4Three File, in its entirety, **until further order of the Court.** (See Rule 1.16, Comment 6 ("Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding").)

(4) Plaintiff's CEO and Managing Member Theodore Kramer shall inform the Court and all other parties, by email, of any change in Plaintiff SIX4THREE, LLC's corporate status or contact

1 information, including but not limited to the mailing address, telephone number and email address,
2 **within one court day of any such change.**

3 (5) The discovery stay ordered in Case Management Order no. 23, issued on April 22, 2019,
4 and in accordance with the Alternative Writ, issued on April 19, 2019, is LIFTED with the Court's
5 ruling on the motions to be relieved as counsel. In light of the instant order, the Court takes no
6 position at this time whether discovery or other matters may proceed as to the alleged violations and
7 continuing violations of the Stipulated Protective Order committed by individual actors.

8 (6) The stay on the merits of the action remains in effect pending the parties' appeals to the
9 anti-SLAPP motions. (See Court of Appeal nos. A154890 and A155334.)

10 (7) In his declaration, filed January 24, 2019, Mr. Kramer requested that Plaintiff "be given
11 until May 31, 2019 to retain new counsel." (Kramer Dec., *supra*, at ¶ 16.) Plaintiff shall promptly
12 file and electronically serve its substitution of counsel. A Case Management Conference regarding
13 Plaintiff's status of retention of new counsel is set for **June 28, 2019 at 2:00 p.m.** in Department 23.
14 Case Management Conference statements addressing Plaintiff's retention of counsel shall be filed
15 and electronically served no later than June 21, 2019. (But see Friedman, Cal. Prac. Guide: Corps.
16 (Rutter, Feb. 2019 Update) ¶ 2:37.2 ("Although a corporation can sue or be sued in its name, *it*
17 *cannot appear in court 'in propria persona'*".))

18 (8) The hearing on the motions to seal is **continued from May 3, 2019 to July 19, 2019 at**
19 **2:00 p.m.** in Department 23.
20
21
22
23
24
25
26
27
28

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):		FOR COURT USE ONLY	
TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____		ENDORSED FILED SAN MATEO COUNTY APR 30 2019 Clerk of the Superior Court By <u>R. Huerta</u> DEPUTY CLERK	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo STREET ADDRESS: 400 County Center MAILING ADDRESS: _____ CITY AND ZIP CODE: Redwood City, CA 94063 BRANCH NAME: Southern Branch		CASE NUMBER: CIV533328	
CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.		HEARING DATE: March 13, 2019 DEPT.: 23 TIME: 9:00 a.m. BEFORE HON.: V. Raymond Swope DATE ACTION FILED: April 10, 2015 TRIAL DATE: Not set	
ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL			

- The motion of (name of attorney): Stuart Gross and Gross & Klein LLP to be relieved as counsel of record for (name of client): Six4Three, LLC a party to this action or proceeding, came on regularly for hearing at the date, time, and place indicated above.
- The following persons were present at the hearing:
See Attachment 2.

FINDINGS

- Attorney has
 - ☐ personally served the client with papers in support of this motion.
 - ☒ served client by mail and submitted a declaration establishing that the service requirements of California Rules of Court, rule 3.1362, have been satisfied.
- Attorney has shown sufficient reasons why the motion to be relieved as counsel should be granted and why the attorney has brought a motion under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1).

ORDER

- Attorney is relieved as counsel of record for client
 - ☐ effective upon the filing of the proof of service of this signed order upon the client.
 - ☐ effective on (specify date): _____
- The client's ☒ current ☐ last known address and telephone number:
Six4Three, LLC
1267 Chestnut Street, Apt. 6, San Francisco, CA 94109

If the client's current address is known, service on the client must hereafter be made at that address unless otherwise ordered in item 13. If the current address is not known, service must be made according to Code of Civil Procedure section 1011 (b) and rule 3.252 of the California Rules of Court.

- The next scheduled hearing in this action or proceeding is set for (date, time, and place):
May 3, 2019 at 2:00 p.m. at 400 County Center, Department 23, Redwood City, CA 94063 ("Dept. 23")
 - The hearing will concern (subject matter):
Motions to Seal

NOTICE TO CLIENT

You or your new attorney, if any, must prepare for and attend this hearing.

Page 1 of 2

CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.	CASE NUMBER: CIV533328
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8. The following additional hearings and other proceedings (including discovery matters) are set in this action (describe the date, time, place, and subject matter of each):
Motion to Seal set for July 19, 2019 at 2:00 p.m. in Dept. 23

9. The trial in this action or proceeding:

- a. ☒ is not yet set.
b. ☐ is set for (specify date, time, and place):

10. Client is hereby notified of the following effects this order may have upon parties.

NOTICE TO CLIENT

Your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

11. Client is notified that, if the client will be representing himself or herself, the client shall be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

You will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

12. Client is notified that it is the client's duty to keep the court informed at all times of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

The court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

13. The court further orders (specify):

See Attachment 13.

Date: APR 29 2019


JUDGE OR JUDICIAL OFFICER

Attachment 2



SUPERIOR COURT OF SAN MATEO COUNTY
400 County Center 1050 Mission Road
Redwood City, CA 94063 South San Francisco, CA 94080
www.sanmateocourt.org

Minute Order

**SIX4THREE, LLC, A DELAWARE LIMITED LIABILITY COMPANY vs.
FACEBOOK, INC, A DELAWARE CORPORATION, et. al.**

CIV533328

**03/13/2019 9:00 AM
Motion to be Relieved as
Counsel
Hearing Result: Held**

**Judicial Officer: Swope, V. Raymond
Courtroom Clerk: Rebecca Huerta**

**Location: Courtroom 8A
Courtroom Reporter: Geraldine Vandeveld**

Parties Present

GODKIN, DAVID S.	Attorney
GROSS, STUART G	Attorney
KIM, CATHERINE Y.	Attorney
LERNER, JOSHUA H	Attorney
MEHTA, SONAL N	Attorney
MILLER, LAURA E.	Attorney
RUSSO, JACK	Attorney

Exhibits

Minutes

Journals

- At 9:12 a.m. - Court convenes.

Also present JAMES MURPHY & JAMES LASSART appeared with and for David Godkin and Birnbaum & Godkin.

Also present DONALD SULLIVAN appeared with Stuart G. Gross.

Also present NATALIE NAGLE in house counsel for Facebook, et al.

Also present JACK RUSSO on behalf of Third Party Theodore Kramer & Thomas Scaramellino.

Also present: ZACHARY ABRAHMSON on behalf of Facebook, et al.

The Court announces it will conduct an in camera review with Mr. Godkin, Mr. Gross, Mr. Kramer and Mr. Scaramellino. Also, Court states it will not ask questions that maybe incriminating or needing to assert 5th amendment.

Furthermore, the Court after in camera hearing shall have the proceedings sealed.

Mr Russo objects and requests to be present at the in camera hearing. The Court denies Mr. Russo's request.

All counsel, parties and public are ordered to vacate the courtroom.

At 9:19 a.m. - Court recess.

At 9:27 a.m. - Court reconvenes.

This portion of the hearing is closed to all parties, counsel and public except for the people mentioned below:

Parties present Mr. Gross, Mr. Godkin, Mr. Kramer and Mr. Scaramelino. No other counsel, parties or public are present.

At 9:28 a.m.- Parties are sworn.

The Court asks Mr. Kramer a question.

Mr. Kramer will not waive attorney/client privilege.

At 9:32 a.m.-Hearing is concluded.

At 9:32 a.m. - Court recesses.

At 9:42 a.m.- Court reconvenes. Above-noted counsel and parties present.

This portion of the hearing is open to be public.

The Court returns Mr. Gross his retainer agreement.

The court finds there is no conflict between attorney and clients and without further evidence.

MOTION TO WITHDRAW AS ATTORNEY OF RECORD is DENIED without prejudice.

The Court informs parties motion to be heard on Friday shall proceed.

Further, the Court orders Mr. Godkin to file a notice of errata as to Declaration of David S. Godkin in support of Plaintiff's motion for attorneys fees and costs missing exhibits. Said notice of errata shall be filed by today at the end of business day.

At 9:53 a.m.- Parties argue as to the tentative ruling.

At 10:39 a.m.-Arguments are concluded.

Having considered the submitted matter, the court rules as follows:

The Court vacates its previous tentative ruling and shall take the matter under submission.

Friday's hearing shall go forward.

Mr. Godkin may appear telephonically.

The Court orders Mr. Frizzora and Mr. Dehaney to file a declaration in regards to documents.

At 10:41 a.m.-Court adjourned.

Case Events

- Matter Taken Under Submission; Due: June 11, 2019; Matter under submission:MOTION TO WITHDRAW AS COUNSEL OF RECORD

Judicial officer:

Others

Comments:

Future Hearings and Vacated Hearings

March 13, 2019 9:00 AM Motion to be Relieved as Counsel
Vandeveld, Geraldine

Swope, V. Raymond
Huerta, Rebecca
Courtroom 8A

March 15, 2019 10:00 AM Motion to Seal
Swope, V. Raymond

March 15, 2019 10:00 AM Motion to Compel
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Complex Case Status Conference
Swope, V. Raymond

Canceled: April 18, 2019 9:00 AM Pretrial hearing
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Canceled: April 25, 2019 9:00 AM Jury Trial
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Attachment 13

Attachment 13

The Court FURTHER ORDERS:

(1) Notwithstanding being relieved as counsel and Stipulated Protective Order, issued October 24, 2016, paragraph 11, Plaintiff SIX4THREE, LLC's counsel Stuart Gross and David Godkin and their respective firms, Gross & Klein, LLP and Birnbaum & Godkin, LLP (collectively "Plaintiff's Counsel"), shall take any and all measures to maintain and preserve in their possession, custody, and/or control any and all records (and/or copies thereof as discussed in Paragraph 3, *infra*), including but not limited to "[c]lient materials and property" as defined in California Rules of Professional Conduct, rule 1.16(e)(1) ("Rule 1.16") and any other communications, discovery, documents, notes, reports, memoranda and/or files, whether in tangible, electronic or other form, relating in any way to this action (collectively "Six4Three File") **until further order of the Court.** (See Kramer Dec. re: Motions to be Relieved as Counsel, filed Jan. 24, 2019, ¶ 17 ("Kramer Dec.").)

(2) Except those portions that have been either publicly filed or unsealed by the Court in this action, Plaintiff's Counsel shall not release any "[c]lient materials and property" pursuant to Rule 1.16(e)(1) to Plaintiff SIX4THREE, LLC ("Plaintiff") that contain, in any way, Defendant FACEBOOK, INC.'s confidential or highly confidential information and/or documents obtained pursuant to the Stipulated Protective Order **to any person and/or entity other than Plaintiff's new counsel.** Plaintiff's new counsel shall comply with the Stipulated Protective Order.

(3) Prior to any release of the "[c]lient materials and property" in accordance with Rule 1.16(e)(1), Plaintiff's Counsel shall make, maintain and preserve a copy of the Six4Three File, in its entirety, **until further order of the Court.** (See Rule 1.16, Comment 6 ("Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding").)

(4) Plaintiff's CEO and Managing Member Theodore Kramer shall inform the Court and all other parties, by email, of any change in Plaintiff SIX4THREE, LLC's corporate status or contact

1 information, including but not limited to the mailing address, telephone number and email address,
2 **within one court day of any such change.**

3 (5) The discovery stay ordered in Case Management Order no. 23, issued on April 22, 2019,
4 and in accordance with the Alternative Writ, issued on April 19, 2019, is LIFTED with the Court's
5 ruling on the motions to be relieved as counsel. In light of the instant order, the Court takes no
6 position at this time whether discovery or other matters may proceed as to the alleged violations and
7 continuing violations of the Stipulated Protective Order committed by individual actors.

8 (6) The stay on the merits of the action remains in effect pending the parties' appeals to the
9 anti-SLAPP motions. (See Court of Appeal nos. A154890 and A155334.)

10 (7) In his declaration, filed January 24, 2019, Mr. Kramer requested that Plaintiff "be given
11 until May 31, 2019 to retain new counsel." (Kramer Dec., *supra*, at ¶ 16.) Plaintiff shall promptly
12 file and electronically serve its substitution of counsel. A Case Management Conference regarding
13 Plaintiff's status of retention of new counsel is set for **June 28, 2019 at 2:00 p.m.** in Department 23.
14 Case Management Conference statements addressing Plaintiff's retention of counsel shall be filed
15 and electronically served no later than June 21, 2019. (But see Friedman, Cal. Prac. Guide: Corps.
16 (Rutter, Feb. 2019 Update) ¶ 2:37.2 ("Although a corporation can sue or be sued in its name, *it*
17 *cannot appear in court 'in propria persona'* ").)

18 (8) The hearing on the motions to seal is **continued from May 3, 2019 to July 19, 2019 at**
19 **2:00 p.m.** in Department 23.
20
21
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27
28

AFFIDAVIT OF MAILING & ELECTRONIC MAILING

CASE NO. CIV533328

DOCUMENT: ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS
COUNSEL-CIVIL(STUART GROSS AND GROSS & KLEIN LLP)

ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS
COUNSEL-CIVIL(BIRNBAUM & GODKIN, LLP)

ENDORSED FILED
SAN MATEO COUNTY

SIX4THREE LLC,

APR 30 2019

vs.

Clerk of the Superior Court
By R. Huerta
DEPUTY CLERK

FACEBOOK, INC. et al,

I declare under penalty of perjury that on the following date I served:

By depositing in the United States Post Office mail box at Redwood City, California a true and correct copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon addressed as set forth below; and

By electronically mailing a true and correct copy of the foregoing document through San Mateo Superior Court's electronic mail system from rhuerta@sanmateocourt.org to the email addresses as set forth below.

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BENJAMIN H. KLEIN, ESQ
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Executed on April 30, 2019
at Redwood City, California 94063
CLERK OF THE SUPERIOR COURT

By **R. HUERTA**
Rebecca Huerta, Deputy Courtroom Clerk

EXHIBIT 18



Digital, Culture, Media and Sport Committee

House of Commons, London SW1A 0AA

Tel 020 7219 6120 Email cmscom@parliament.uk Website www.parliament.uk/cms

Mr Theodore Kramer
London Marriott Hotel County Hall
Westminster Bridge Rd
London SE1 7PB

19th November 2018

Dear Mr Kramer,

Order for documents

The Digital, Culture, Media and Sport Committee has been given the power by the House of Commons under Standing Order No. 152(4) "to send for persons, papers and records". This includes the power to compel the production of papers by people within UK jurisdiction.

On Monday 19 November, the Committee made the following order (which will be published in its formal minutes in due course):

Ordered, That Mr Theodore Kramer submit the following documents to the DCMS Committee in relation to its inquiry into Disinformation and 'fake news', by 5pm on 20th November 2018:

Unredacted copies of Six4Three's opposition to the anti-SLAPP (strategic lawsuits against public participation) motion, filed in the California courts, relating to the company's dispute with Facebook, along with any documents or notes relating Six4Three's opposition to the anti-SLAPP motion.

We are requesting these documents because we believe that they contain information that is highly relevant to our ongoing investigation into disinformation and fake news. In particular, we are interested to know whether they can provide further insights to the committee about what senior executives at Facebook knew about concerns relating to Facebook users' data privacy, and developers' access to user data. The Committee's request is made for these reasons, and in no way suggests any support for the position of your organisation in its dispute with Facebook.

As noted in Erskine May's *Parliamentary Practice*: "there is no restriction on the power of committees to require the production of papers by private bodies or individuals provided that such papers are relevant to the committee's work as defined by its order of reference. [...] Solicitors have been ordered to produce papers relating to a client" (Erskine May, *Parliamentary Practice*, 24th edition, 2011, p.819.)

As Erskine May also notes: "Individuals have been held in contempt who [...] have disobeyed or frustrated committee orders for the production of papers" (p.839). Should you fail to comply with the order of the Committee and were found to be in contempt, you could face investigation and sanction by the House.

We require the documents by 5pm on Tuesday 20th November 2018. I look forward to your compliance with this Order.

Yours sincerely,

DAMIAN COLLINS MP

CHAIR, DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE



Digital, Culture, Media and Sport Committee

House of Commons, London SW1A 0AA

Tel 020 7219 6120 Email cmscom@parliament.uk Website www.parliament.uk/cms

19 November 2018

Extract from formal minutes of the Committee of 19 November 2018:

Ordered, That Mr Theodore Kramer submit the following documents to the DCMS Committee in relation to its inquiry into Disinformation and 'fake news', by 5pm on 20th November 2018:

Unredacted copies of Six4Three's opposition to the anti-SLAPP (strategic lawsuits against public participation) motion, filed in the California courts, relating to the company's dispute with Facebook, along with any documents or notes relating Six4Three's opposition to the anti-SLAPP motion.

DAMIAN COLLINS MP

CHAIR, DCMS COMMITTEE

EXHIBIT 19



Digital, Culture, Media and Sport Committee

House of Commons, London SW1A 0AA

Tel 020 7219 6120; Email: dmscom@parliament.uk; Website: www.parliament.uk/dms

Mr Theodore Kramer
London Marriott Hotel County Hall
Westminster Bridge Rd
London SE1 7PB

21 November 2018

Dear Mr Kramer,

Order for documents

On Monday 19 November, the Committee made the following Order:

Ordered, That Mr Theodore Kramer submit the following documents to the DCMS Committee in relation to its inquiry into Disinformation and 'fake news', by 5pm on 20th November 2018:

Unredacted copies of Six4Three's opposition to the anti-SLAPP (strategic lawsuits against public participation) motion, filed in the California courts, relating to the company's dispute with Facebook, along with any documents or notes relating to Six4Three's opposition to the anti-SLAPP motion.

You did not comply with this order by the 5pm deadline, and failed to supply us with a satisfactory reason for not doing so.

I re-issued the Order on 20 November, with a deadline of 11am today. In the accompanying letter, I warned you that, should you fail to respond by the 11am deadline today, it would be my duty to ask the Committee immediately to report this matter to the House of Commons, and request that it take action against you. As a result of failing to comply with an Order of the Committee you could be considered to be acting in contempt and face investigation and sanction by the House.

The letter was delivered to you in person at 9am this morning by the Serjeant at Arms, as warrant officer of the House.

You again failed to comply.

As a result, the Committee met at 11am and formally ordered that I report your non-compliance to the House. I have taken this action, and reported your failure to comply to the House. This will appear on today's formal record, and the process of investigation will commence.

Yours sincerely,

DAMIAN COLLINS MP,
CHAIR, DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE

EXHIBIT 20

Electronically

FILED

by Superior Court of California, County of San Mateo

ON 11/28/2018

By /s/ Mia Marlowe
Deputy Clerk

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Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S BRIEF
RE: COURT'S ORDER DATED NOVEMBER
20, 2018**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

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1 **I. INTRODUCTION**

2 As this Court has already recognized, Mr. Kramer and his counsel explicitly admit they breached
3 this Court's protective and sealing orders and destroyed evidence. What remains is to identify just how
4 extensive that breach was, so that the Court can order all necessary remedies and issue all appropriate
5 sanctions. All the more because Six4Three's explanation of these events raises more questions than it
6 answers.

7 At the outset, Six4Three asks the Court to accept a narrative that is improbable as a matter of
8 common sense and inconsistent with the documents and public facts that are available so far. For
9 example:

- 10 • Mr. Kramer asks the Court to believe that Six4Three was put in an "untenable" situation by the
11 Digital, Culture, Media and Sport Committee ("DCMS Committee") while Mr. Kramer was
12 traveling to the United Kingdom for business. In so doing, he asks the Court to ignore that:
 - 13 ○ Six4Three had been in contact with Mr. Collins and the DCMS Committee since at least
14 October 1, without notifying Facebook or the Court, even at the October 11 hearing on the
15 motions to seal the very materials at issue.
 - 16 ○ While Mr. Kramer gives no information about the business he was in the United Kingdom
17 to undertake, he happened to choose a hotel that is approximately 1500 feet from the
18 House of Parliament and Portcullis House (where the DCMS Committee sits and
19 Members of Parliament offices are located).
 - 20 ○ Six4Three actually *invited* the DCMS Committee to request documents produced in this
21 litigation and to issue a subpoena purporting to compel their production. *See* Declaration
22 of Theodore Kramer in Support of Plaintiff's Brief in Response to November 20, 2018
23 Order ("Kramer Decl.") Ex. 1 at 1 ("Finally, I have attached a document that should assist
24 you and your committee as you approach Facebook for documentation and evidence
25 related to the company's handling of user data since January 1st, 2012. Carole
26 recommended we send it to you.") (attaching a document entitled "Requests for
27 Production_six4three.pdf", which Six4Three has not yet disclosed to the Court or
28

Facebook); *see also id.* Ex. 3 (“I can confirm that your description of the documents in my possession is accurate. . . . I will agree to accept service of a subpoena.”).

- Mr. Kramer asks the Court to believe that, between the time this Court ordered him not to turn the documents over the DCMS Committee and the time he did so (two days later), Mr. Kramer was sufficiently concerned about the legal consequences of declining to provide the documents to the DCMS Committee that he would risk a contempt finding by this Court, even though by his own account:

- Mr. Kramer did not seek legal advice from his lawyers (or lawyers with expertise in parliamentary procedure) about the predicament he claims to have found himself in. Indeed, although Mr. Kramer purports to have “immediately” notified his lawyers upon receiving the first two DCMS Committee orders, he did not think to notify them before taking the documents to Parliament.
- Mr. Kramer allegedly arrived unannounced to the House of Commons and asked to see a Member of Parliament, where he “intended to convince Mr. Collins that he could not force me to turn over documents subject to the Protective Order.” Although he “did not intend to comply with the DCMS Orders,” he brought with him from his nearby hotel an untold number of confidential and highly confidential Facebook documents he should not even have had access to, along with a thumb drive for copying the documents.
- Already knowing that he was subject to contempt of this Court’s orders, Mr. Kramer was apparently more concerned with being held in contempt of the DCMS Committee and searched his cache of documents for documents to provide to the DCMS Committee. He claims he did “not know whether [he] was free to leave the location, or if [he] had been allowed to leave, if [he] would be permitted to fly home to the United States,” but apparently still did not think to ask to speak to his counsel or even to ask whether he was being held against his will by the Member of Parliament (who presumably has no authority to hold a foreign national that had not been charged with or convicted of any crime).

- 1 ○ Although he had been concerned about the consequences of being held in contempt of
2 Parliament and knew he was subject to being held in contempt by this Court, after handing
3 over an unidentified set of Facebook’s confidential documents to the DCMS Committee,
4 he allegedly left the United Kingdom without contacting his counsel. He flew home and
5 enjoyed Thanksgiving with his family without contacting counsel. He waited until two
6 days later to even let his counsel, let alone the Court or Facebook, know that he had
7 disclosed confidential documents to the DCMS Committee in violation of this Court’s
8 orders.
- 9 • Six4Three’s counsel asks the Court to believe that, upon learning of all of this, counsel was
10 “vexed” by Mr. Kramer’s actions, but decided the wisest course of action was to instruct Mr.
11 Kramer to spoliage evidence by *deleting* the Dropbox cache on his computer, notwithstanding
12 that:
- 13 ○ According to Six4Three, the Dropbox cache would have been the only available record of
14 what files Mr. Kramer accessed while he was meeting with the DCMS Committee, since
15 Mr. Kramer claims he has no memory of what he copied for the DCMS Committee.
16 Counsel did not ask the Court or Facebook for input on this issue or even disclose this fact
17 to the Court or Facebook until three days later, with Six4Three November 26, 2018
18 submission.
- 19 • Six4Three’s counsel asks the Court to believe that they had no idea that Mr. Kramer had access to
20 confidential or highly confidential Facebook information until Facebook raised a concern on
21 November 19, even though:
- 22 ○ The documents were produced only to Six4Three’s counsel and thus could not have gotten
23 to Mr. Kramer unless Six4Three’s counsel provided them to him (directly or indirectly).
- 24 ○ Mr. Kramer had confirmed to Mr. Collins on November 4 that he had “in [his]
25 possession” unredacted copies of, among other things, Six4Three’s Corrected
26 Memorandum of Points and Authorities in Opposition to Defendants’ Special Motions to
27 Strike (Anti-SLAPP) filed on May 18, 2018; the Godkin Anti-SLAPP Declaration; and
28 Exhibits 1-212 to the Godkin Anti-SLAPP Declaration filed on May 18, 2018. *See*

1 Kramer Decl. Ex. 3 (saying “I can confirm that your description of the documents in my
2 possession is accurate” in response to a request from Mr. Collins that Mr. Kramer provide
3 *unredacted* copies of the Six4Three’s opposition brief, the Godkin Declaration, Exhibits
4 1-212 to the Godkin Declaration, and “[a]ll documents containing summaries or analyses
5 of any of the exhibits to the Godkin Anti-SLAPP Declaration filed on May 18, 2018.”).

6 And even accepting the above, a number of questions arise from Six4Three’s submission. By
7 way of example, one wonders:

- 8 • Who was involved in and had knowledge of Six4Three’s communications with *The Guardian* and
9 the DCMS Committee and to what extent? What was in the “summary” Six4Three gave to the
10 DCMS Committee? Who prepared the list of document requests for the DCMS Committee and
11 what was on the list?
- 12 • How did Mr. Kramer get access to Facebook’s highly confidential information in violation of the
13 protective order? Who set up the Dropbox? When? What documents were on it last week?
14 What documents have been on it since it was set up? When did Mr. Kramer set up the syncing
15 between the Dropbox folder and his computer?
- 16 • Who else had access to the Dropbox containing Facebook’s highly confidential information?
17 Who accessed it? When?
- 18 • What happened between the August 28, 2018 meeting between Mr. Kramer and *The Guardian*’s
19 Carole Cadwalladr (at which she reportedly said she would like to raise this case with Damian
20 Collins) and the October 1, 2018 email Mr. Kramer sent to Mr. Collins in which he sent Mr.
21 Collins a list of litigation documents the DCMS Committee should request, he says at Ms.
22 Cadwalladr’s suggestion?
- 23 • Why were the Court and Facebook not given notice of the DCMS Committee’s request for
24 documents (as invited by Six4Three) until November 19, 2018?
- 25 • Why did Mr. Kramer travel to the United Kingdom with Facebook’s confidential and highly
26 confidential information in the first place?
- 27 • Exactly what documents were provided to the DCMS Committee?

- Why did Six4Three’s counsel instruct Mr. Kramer to delete the Dropbox and local copies of it? Were any steps taken to preserve evidence of the contents of the Dropbox, including who accessed those documents, or what documents Mr. Kramer copied to the thumb drive he gave to the DCMS Committee?
- Why did Mr. Kramer fail to notify his own counsel or Facebook at the time he provided the documents to the DCMS Committee in direct violation of this Court’s various orders?
- What other violations of the protective order have occurred?

Facebook requests prompt discovery and an order to show cause so that Facebook—and more importantly the Court—can get to the bottom of what actually happened here.

II. THE COURT SHOULD GRANT DISCOVERY AND ISSUE AN ORDER TO SHOW CAUSE AND PROMPTLY CONDUCT CONTEMPT PROCEEDINGS

The Court’s November 20, 2018 Order for Briefing and Staying Submission of Unredacted Copies of Sealed Documents (“November 20 Order”) posed a number of specific questions as to the authority of the DCMS Committee to compel production of confidential and sealed materials from this litigation. Many of those questions have been overtaken by Six4Three and its counsel’s knowing decisions to violate the Court’s orders in the interim, but Facebook addresses them in Sections III and IV below. First, however, Facebook addresses the admissions in Six4Three’s November 26 submission.

A. Six4Three and its Counsel Admit They Have Violated This Court’s Order

As the Court’s November 27, 2018 Order and Notice of Hearing Concerning Matters Subject to this Court’s Sealing and Protective Orders and Order Issued November 20, 2018 (“November 27 Order”) determined, it is undisputed that Six4Three, Mr. Kramer, and counsel have violated this Court’s orders. At the outset, “Mr. Kramer admits he produced documents subject to the Sealing and Protective Orders from a DropBox account and in violation of the Order.”¹ November 27 Order at 2. Beyond that, Mr.

¹ Of course, the breach did not stop with the *disclosure* of the confidential and sealed documents to the DCMS Committee. On Tuesday, the DCMS Committee held a public, widely-publicized hearing in which the documents disclosed by Mr. Kramer were actually *used* to question a Facebook representative. For example, the Court may recall Exhibit 153 to the Godkin Declaration—an email chain in which a Facebook engineer mistakenly thought calls to Facebook’s servers from Pinterest were originating in Russia, but then quickly realized his mistake and advised it was a false alarm. The first part of the email

1 Gross has admitted that “documents designated as highly confidential under the Protective Order, as well
2 as summaries of such documents, had been placed in a folder located in Six4Three’s dropbox account
3 over which Mr. Kramer had access,” which itself, despite counsel’s transparent use of the passive voice
4 to avoid responsibility, is a separate violation of the Protective Order. Declaration of Stuart G. Gross in
5 Support of Plaintiff’s Brief in Response to November 20, 2018 Order (“Gross Decl.”) ¶ 7. These are just
6 the violations that Six4Three has admitted to. The remainder of its November 26 submission only
7 heightens concerns that there are other serious violations of this Court’s orders that have not yet come to
8 light.

9 **B. Immediate Discovery Into the Scope and Extent of Violation of This Court’s Orders**
10 **Is Necessary**

11 **1. Immediate Document Discovery and Cross-Examination (Via Deposition or**
12 **Live Evidentiary Hearing) Are Necessary**

13 As set forth in Facebook’s November 26 Ex Parte Application For Expedited Relief Re
14 Six4three’s Contempt, Including An Order To Show Cause (“November 26 Ex Parte Application”),
15 immediate document discovery and cross-examination of the relevant individuals is necessary to get to
16 the bottom of Six4Three’s violation of the Court’s orders. Facebook does not repeat here its argument
17 with respect to the scope of discovery that is necessary, but addresses two supplementary points.

18 *First*, based on the revelations in Six4Three’s November 26 submission, Facebook respectfully
19 submits that the Court and Facebook needs the following discovery beyond that previously requested in
20 Facebook’s November 26 Ex Parte Application to determine the scope of the breaches:

- 21 • The three attachments to Mr. Kramer’s October 1, 2018 email to Damian Collins. *See* Kramer
22 Decl. Ex. 1.
- 23 • All logs or other records pertaining to the Six4Three Dropbox account that Mr. Kramer accessed
24 from his laptop, including all available or recoverable information about what documents were

25 chain was raised during Tuesday’s hearing, forcing Facebook to release the entire Exhibit 153 to provide
26 the media and public with appropriate context. *See* <https://www.cnn.com/2018/11/27/tech/facebook-hearing-damian-collins/index.html> (“Later on Tuesday, Facebook released a copy of the email chain with
27 the engineer’s warning. The full chain showed that the engineer appears to have been mistaken. . . . It is
28 not clear if the committee had access to the entire chain or just the emails in which the engineer initially
raised the false alarm. CNN has asked the committee to clarify.”).

1 uploaded to the account and by whom, what documents were downloaded from the account and
2 by whom, what documents were deleted from the account and by whom, when the account was
3 cached or synched locally and on what devices, and all individuals that had access to the account
4 and when.

- 5 • All emails or other communications amongst and between Mr. Gross or anyone at Gross & Klein,
6 Mr. Godkin or anyone at Birnbaum Godkin, Mr. Kramer, Mr. Scaramellino or any other agent,
7 attorney, or individual associated with Six4Three from May 21, 2018 to the present regarding
8 Facebook's confidential or highly confidential information. For avoidance of doubt, this would
9 include without limitation communications relating to contacts with the DCMS Committee, *The*
10 *Guardian*, or other third parties. To the extent Six4Three may previously have purported to assert
11 a claim of privilege over such communications, any such claim is non-viable for the reasons set
12 forth below in Section II.B.2.
- 13 • A forensic analysis of Mr. Kramer's laptop and the thumb drive (if it is still in his control), as
14 well as the computers and/or electronic devices of Six4Three's counsel and any other individual
15 that had access to Six4Three's Dropbox account.

16 **Second**, that Six4Three and its counsel produce the requested discovery by 5:00 p.m. on
17 November 29, 2018 or, in view of the November 30 hearing, by 5:00 p.m. on Monday, December 3. In
18 particular, Six4Three's suggestion that it should be given until **December 28** to produce discovery should
19 be rejected in these circumstances. *See* Plaintiff's Limited Response, In Part, to Defendants' Ex Parte
20 Application for Expedited Relief re Six4three's Contempt, Including an Order to Show Cause at 3.
21 Given counsel's admission that he directed the destruction of critical evidence relating to these matters,
22 delaying the production of relevant information by another month only risks that additional relevant
23 information will be lost or destroyed. Moreover, Mr. Kramer has already said he cannot remember the
24 materials he turned over to DCMS Committee just last week—delaying depositions until January (which
25 would be necessary if the documents are not even produced until December 28) risks further claims that
26 memories have faded. *See* Kramer Decl. ¶ 18. And perhaps most importantly, delaying discovery
27 impedes the Court and Facebook learning the true extent of disclosure of Facebook's confidential
28 information—delaying any potential remedial measures and risking further disclosures with every

1 passing day. Against that backdrop, there is no good reason that discovery should not proceed
2 immediately. And Six4Three has not offered any.

3 2. Depositions of Six4Three's Counsel Are Essential

4 The depositions of Six4Three's counsel are essential. There is no dispute that the Court and
5 Facebook are in this predicament *solely* because Six4Three's counsel violated the Stipulated Protective
6 Order and granted Mr. Kramer access to documents that he should not have had access to. *But for*
7 *counsel's violation of the Stipulated Protective Order, Mr. Kramer's subsequent trampling of this*
8 *Court's Orders never could have occurred.* Moreover, Mr. Kramer and Mr. Gross have both attested
9 that Mr. Kramer destroyed evidence relating to his violation of the Court's orders *at the direction of*
10 *counsel.* See Kramer Decl. ¶ 24; Gross Decl. ¶ 11.

11 As Six4Three concedes, a party may depose opposing counsel where: (1) counsel's testimony is
12 not privileged; (2) the testimony is crucial to the case; and (3) there is no other way to get the
13 information. *Spectra-Physics, Inc. v. Superior Court (Teledyne, Inc.)*, 198 Cal. App. 3d 1487, 1496
14 (1988). Here, there is no privilege for two reasons.

15 **First**, Six4Three expressly waived privilege over communications relating to these issues by
16 disclosing a limited set of communications that it apparently believes are favorable. *Jones v. Superior*
17 *Court (Benny)*, 119 Cal. App. 3d 534, 547–48 (1981), *disapproved of on other grounds by Williams v.*
18 *Superior Court (Marshall's of CA, LLC)*, 3 Cal. 5th 531, 557 n.8 (2017) (“Where the disclosure sought is
19 so related to the disclosure already made that the [privilege holder] could not reasonably retain a privacy
20 interest in preventing it, then the purpose of the privilege no longer exists, and it may be said that the
21 privilege has been waived.”); *see also Chicago Title Ins. Co. v. Superior Court (Cal. Canadian Bank)*,
22 174 Cal. App. 3d 1142, 1151 (1985) (holding that when plaintiff placed at issue its knowledge of the
23 alleged fraud, it waived attorney-client privilege as to all communications between plaintiff and its
24 employees related to that knowledge); *Garcia v. Progressive Choice Ins. Co.*, No. 11-CV-466-BEN
25 (NLS), 2012 WL 3113172, at *4–*7 (S.D. Cal. July 30, 2012) (applying California privilege law to
26 conclude that the disclosure of certain privileged emails relating to an insurance claim waived privilege
27 as to other emails involving the same insurance claim). Indeed, Six4Three has offered up its
28 communications on four broad categories of information that are necessary to determine what happened

1 here. It is critical to note that Six4Three, **not Facebook**, bears the burden of establishing privilege, and it
2 made no effort to do so in any of its papers.

- 3 • As to who created the Dropbox account at issue, what controls were enabled (or not), and when
4 Mr. Kramer and others accessed it, Six4Three waived privilege as to where, when, and how they
5 learned about the relevant facts. Counsel claims they did not learn that Mr. Kramer had access
6 until November 20, 2018. Gross Decl. ¶ 7; Godkin Decl. ¶ 6. But that is contrary to Mr.
7 Kramer's sworn declaration under penalty of perjury that *in May 2018*, he told a reporter that the
8 documents were "stored on a file server in the cloud." Kramer Decl. ¶ 3. Counsel **never** claim
9 that they were unaware of this communication.
- 10 • As to counsel's communications relating to Mr. Kramer about his access to the Dropbox account,
11 his review of Facebook's documents, and "confirmation" that Mr. Kramer had not reviewed the
12 documents, counsel again waived privilege. Counsel openly states that they "confirmed Mr.
13 Kramer had never reviewed any documents designated as highly confidential." Gross Decl. ¶ 8;
14 Godkin Decl. ¶ 8. Counsel also argues that they did not know that the Dropbox was set up to
15 synch to the laptop that was in Mr. Kramer's possession. Gross Decl. ¶ 8; Godkin Decl. ¶ 9.
16 Again, counsel's arguments are contrary to the documents. On November 4, 2018, weeks before
17 Six4Three notified the Court or Facebook of the DCMS Committee's demands, Mr. Kramer
18 wrote to the DCMS Committee: "I can confirm that your description of the documents *in my*
19 *possession* is accurate. These documents are subject to confidentiality under the protective
20 order" Kramer Decl. Ex. 3 (emphasis added). Notably Six4Three's counsel claims
21 ignorance of some communications but **not** this one.
- 22 • As to counsel's communications relating to the sharing of documents with the DCMS Committee,
23 counsel now claims that they did not learn of it until November 23, 2018. Gross Decl. ¶¶ 9–10;
24 Godkin Decl. ¶ 17. Counsel states that they made efforts to prevent "Mr. Kramer from taking
25 such actions." Gross Decl. ¶ 10. Of course, counsel has not attached **any** documents or records
26 of communications showing that they were either surprised by the disclosure or that there was **a**
27 **single** instruction to Mr. Kramer not to make it. Rather, counsel simply claims that his
28

1 administrative assistant forwarded his communications with the Court and the DCMS Committee
2 to Mr. Kramer. *See* Godkin Decl. ¶¶ 4, 11, 13.

- 3 • Finally, as to the destruction of documents, counsel admits that they directed the destruction of
4 key evidence: the Dropbox that Mr. Kramer used to synch documents, to search documents, and
5 to disclose documents. Gross Decl. ¶ 11.

6 **Second**, Mr. Kramer’s communications show a coordinated effort—with input from counsel—to
7 circumvent at the very least this Court’s order sealing the documents at issue. Thus, even if Six4Three
8 had not waived privilege on these subjects by putting communications between counsel and Mr. Kramer
9 directly at issue in the three declarations submitted on November 26, the crime-fraud exception applies
10 here. “There is no privilege under this article if the services of the lawyer were sought or obtained to
11 enable or aid anyone to commit or plan to commit a crime or a fraud.” Cal. Evid. Code § 956(a). The
12 facts here are more than sufficient to make out a prima facie case that the services of counsel were sought
13 and obtained “to enable or aid anyone to commit or plan to commit a crime or a fraud”—and a prime
14 facie case is all that is required to invoke the crime-fraud exception. *State Farm & Cas. Co. v. Superior*
15 *Court (Taylor)*, 54 Cal. App. 4th 625, 643 (1997), *as modified* (May 1, 1997).

16 Within days of this Court’s unequivocal order rejecting Six4Three’s long-standing effort to
17 unseal these documents, Six4Three started the process of finding another way to disclose the documents.
18 The communications from Mr. Kramer make it painfully obvious that he was working with advice of
19 counsel. On November 4, 2018—***just three days after this Court sealed the documents in question***—
20 Mr. Kramer agreed to accept a subpoena from the DCMS Committee. Kramer Decl. Ex. 3. Mr. Kramer,
21 however, explained that he would need to give notice under the protective order, which neither he nor
22 counsel did, even though they were already in receipt of requests for documents. *Id.* Mr. Kramer also
23 stated that a member of his legal team would need to be on any calls. *Id.* Thus, it is no surprise that
24 neither Mr. Kramer nor counsel denies that they were working together on this communication.
25 Similarly, neither Mr. Kramer nor counsel claims that they were not working together on
26 communications with the media, including the meetings with *The Guardian*. Kramer Decl. ¶¶ 3–4, 10,
27 Exs. 5–6.

On November 12, 2018, Mr. Kramer carefully instructed the DCMS Committee that he needed more than a request for voluntary disclosure; he told the Committee that he could not “*voluntarily* disclose the materials you have requested as they are subject to a protective order in California Superior Court.” Kramer Decl. Ex. 4 (emphasis added); *see also id.* Ex. 3 (agreeing to accept service of a subpoena and noting “Upon receipt of any subpoena, I would be required to notify Facebook. If Facebook wishes to prevent my compliance, it will need to take action in appropriate fora.”). Again, it is no surprise that there is no suggestion that this communication was written without input from counsel. Indeed, Mr. Kramer does not claim that he acted without advice of counsel until November 21, 2018. Kramer Decl. ¶ 15.

In sum, the documents show a coordinated effort by Mr. Kramer and his counsel to invite a foreign Committee to issue a non-voluntary order in conflict with this Court’s orders without giving this Court or Facebook notice. The “fraud” that gives rise to the crime-fraud exception includes a fraud on the Court, and that is exactly what happened here. *BP Alaska Exploration, Inc. v. Superior Court (Nahama & Weagant Energy Co.)*, 199 Cal. App. 3d 1240, 1263 (1988).

Turning to the remaining factors that justify the depositions of counsel, testimony on these subjects is critical. Without the testimony of counsel, there is no way for the Court or Facebook to get to the bottom of what happened and why. Counsel only claims ignorance of some communications and not others. And importantly, counsel does not claim ignorance of the many emails from weeks ago in which Mr. Kramer used legalese to communicate with the DCMS Committee in an effort to kick off this entire melee. It is equally noteworthy that counsel has not submitted a single document supporting their alleged lack of knowledge about the Dropbox account or a single document actually instructing Mr. Kramer not to disclose documents. In short, counsel is disclosing facts they like without allowing the Court or Facebook to test them—a quintessential use of attorney-client communications as a sword, barring reliance on privilege as a shield. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

Second, there is no other way to get this information than from counsel in depositions. Only counsel knows where, what, and with whom they communicated on these subjects. Unless counsel is withholding documents from the Court (i.e., purposefully not attaching relevant communications to their

1 declarations), many communications apparently were oral. And Six4Three's decision to withhold notice
2 until the eve of the disclosure here means that there is no time for slower methods; we need to get to the
3 bottom of this now.

4 **III. RESPONSES TO THE COURT'S LEGAL QUESTIONS²**

5 **A. Background on Parliamentary Select Committee Powers**

6 The DCMS Committee is a parliamentary select committee of the House of Commons. *See*
7 Miller Decl. Ex. 2 (Letter from Speaker's Counsel to Godkin (Nov. 23, 2018)) at 1. Its powers, including
8 investigatory powers, are derived from internal parliamentary standing orders and resolutions of
9 Parliament. Gordon Decl. ¶ 5. These powers are fundamentally distinct from United Kingdom *law*,
10 decided and enforced by the United Kingdom courts, whose power derives from statute, the common
11 law, and equity. *Id.*

12 As such, select committee proceedings operate entirely separate from the United Kingdom legal
13 system. Gordon Decl. ¶ 12. An order from the DCMS Committee for the production of documents
14 cannot be enforced through a court of law in the United Kingdom. *Id.* Indeed, there is no process
15 recognized in the law of the United Kingdom for enforcing an order of a select committee. Gordon Decl.
16 ¶ 13. As explained in more detail below, the established process for enforcing an order of a select
17 committee to produce documents is to refer the purported breach to the House of Commons as a whole.
18 *Id.* In modern history, enforcement actions with respect to a finding of contempt of Parliament are rare,
19 and the scope of the process is uncertain and its effectiveness limited. *Id.*

20 Following from the constitutional separation of the United Kingdom Parliament and courts of
21 law, if confidential documents are disclosed to a select committee, there are no legal constraints upon the
22 use of those documents by the select committee in performance of its functions, including making the
23 documents public. Gordon Decl. ¶ 14. Because the United Kingdom courts will not intervene to restrain
24

25 ² To address the Court's legal questions regarding parliamentary procedure, Facebook includes with this
26 brief a declaration from Richard Gordon, a practicing barrister holding the title of Queen's Counsel. Mr.
27 Gordon is a specialist in United Kingdom constitutional and administrative law. *See* Ex. 1 to the
28 Declaration of Laura E. Miller submitted herewith ("Miller Decl."), Declaration of Richard Gordon,
Queen's Counsel ("Gordon Decl.") ¶¶ 1–2.

1 the use and disclosure of confidential documents, the consequences of disclosure to the select committee
2 may be irreparable. *Id.*

3 **B. What Authority Does the DCMS Committee Have to Overrule the Court's Orders**
4 **Without First Seeking Relief From the Court? (Question 3(a))**

5 Facebook does not understand the DCMS Committee to have expressly overruled the Court's
6 orders regarding the confidentiality of the Facebook information at issue. Rather, the DCMS
7 Committee's position is that *it* is not bound by orders of this Court. *See* Miller Decl. Ex. 2 (Letter from
8 Speaker's Counsel to Kramer (Nov. 23, 2018)) at 2 ("It would have been wholly inappropriate for [the
9 DCMS Committee] to make prior application to a court in California, which does not exercise authority
10 over Parliament's exercise of its functions in the United Kingdom"); *id.* at 1 ("We regret that we are
11 unable to brief the court directly; it would be improper for us to do so as we have no standing in the case
12 and the House of Commons is not within the jurisdiction of the court.").

13 The corollary to this position is that the DCMS Committee does not assert and cannot exercise
14 any authority over this Court and this Court is not bound by any action taken by the DCMS Committee in
15 the United Kingdom. Indeed, the DCMS Committee made this very point to Mr. Kramer when it first
16 asked for these documents, prior to Mr. Kramer's recent trip to the United Kingdom. Specifically, Mr.
17 Collins warned Mr. Kramer:

18 I should highlight that, if any disclosure of this material to the Committee
19 has consequences in the US courts, the Committee cannot protect you.
20 Committee proceedings are subject to parliamentary privilege in the United
21 Kingdom under Article IX of the 1689 Bill of Rights, but this legislation
does not have extraterritorial effect and could not be expected to be upheld
in a US court.

22 Miller Decl. Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)). Indeed, there does not appear to be
23 any dispute that Mr. Kramer remained bound by the provisions of the Stipulated Protective Order, the
24 Court's sealing orders, and the November 20 Order, notwithstanding the requests from the DCMS
25 Committee. And yet, he still travelled to the United Kingdom (and, specifically, went to the House of
26 Commons) with a thumb drive for easy transfer of files and copies on his laptop of confidential and
27 highly confidential documents that he was not allowed access to under the terms of the Stipulated
28 Protective Order and that this Court had ordered sealed.

1 **C. What Is the Legal Effect, Under Both United States and United Kingdom Law, of the**
2 **DCMS Letter to Mr. Kramer? (Question 3(b))**

3 Just as the DCMS Committee's order has no legal effect within the United Kingdom courts, *see*
4 Gordon Decl. ¶ 16, it also has no legal effect within the court systems of the United States, including the
5 California courts. As noted above, the DCMS Committee specifically warned Mr. Kramer that
6 compliance with its requests to disclose Facebook's confidential information could have consequences in
7 the United States courts. Miller Decl. Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)).

8 **First**, the cases cited by Six4Three regarding the principle of international comity have no
9 application here. The cases discussed by Six4Three all involve United States federal courts deciding
10 whether to either compel discovery from a foreign entity or issue an injunction already imposed by a
11 foreign court on a foreign entity. *See* Plaintiff's Brief in Response to November 20, 2018 Order ("643
12 Br.") at 11–12. As Six4Three itself admits, that is not the situation we have here. 643 Br. at 11 ("The
13 Supreme Court has provided a multi-factor balancing test for determining when U.S. courts should
14 exercise their authority to compel production of evidence constrained by foreign law, the inverse of the
15 situation here.").

16 Six4Three's brief also provides no guidance to the Court (or Facebook) as to why it believes this
17 doctrine applies to the potential contempt and sanctions proceedings against Six4Three, Mr. Kramer, and
18 Six4Three's counsel. Here, Mr. Kramer knowingly violated preexisting orders from this Court.
19 Six4Three's counsel also violated orders from this Court, although they deny it was knowingly. In both
20 cases, the issue at hand is whether this Court can enforce its *own* orders against the principal of the
21 **plaintiff in this lawsuit** (who also happens to be a California resident), and against lawyers appearing
22 before the Court (who are admitted in California or admitted *pro hac vice*). This has nothing to do with
23 the balancing test set forth in *Societe Nationale Aerospatiale v. United States District Court for the*
24 *Southern District of Iowa*, 482 U.S. 522 (1987), which addresses "the extent to which a federal district
25 court must employ the procedures set forth in the [Hague] Convention when litigants seek answers to
26 interrogatories, the production of documents, and admissions from a French adversary over whom the
27 court has personal jurisdiction." *Id.* at 524. Similarly, *Pilkington Brothers P.L.C. v. AFG Industries Inc.*,
28 581 F. Supp. 1039 (D. Del. 1984), does not inform the matters before this Court. As Six4Three itself

1 notes, that case dealt with the question of “whether an American court *must* duplicate a foreign interim
2 injunction, without reference to the underlying dispute, where there are ongoing and continuous
3 violations of that foreign injunction.” *Id.* at 1042 (emphasis added). Needless to say, there is no foreign
4 injunction for this Court to duplicate here. Mr. Kramer disclosed Facebook’s confidential information in
5 willful defiance of several of this Court’s orders and the Court retains its full power and authority to
6 address that act of contempt.

7 **Second**, as discussed above, the orders of a select committee have no legal effect outside the
8 powers of Parliament, including in the United Kingdom courts of law. There is no foreign *law* that
9 conflicts with this Court’s multiple orders prohibiting Six4Three (and therefore Mr. Kramer) from
10 disclosing Facebook’s confidential information.

11 **Third**, Six4Three’s references to the Hague Convention fare no better. The Evidence Section of
12 the Hague Convention is expressly limited to *judicial* bodies of the signatory nations. *See* Convention of
13 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, 23 U.S.T. 2555
14 (“In civil or commercial matters a *judicial authority* of a Contracting State may, in accordance with the
15 provisions of the law of that State, request the competent authority of another Contracting State, by
16 means of a Letter for Request, to obtain evidence, or to perform some other judicial act.”) (emphasis
17 added). Moreover, the DCMS Committee did not go through the specific procedures set forth in the
18 Hague Convention, which would have given Facebook the opportunity to object and otherwise respond.

19 **D. Is the DCMS Letter Different Than a Summons? (Question 3(c))**

20 Put simply, the November 19, 2018 DCMS Committee letter to Mr. Kramer was not a summons.
21 The DCMS Committee does not dispute this. *See* Miller Decl. Ex. 2 (Letter from Speaker’s Counsel to
22 Kramer (Nov. 23, 2018)) at 2 (The letter “is not issued by a court but by Parliament.”). It is not an order
23 under the laws of the United Kingdom. And although Mr. Kramer walked to the House of Commons to
24 discuss the matter with Mr. Collins, the letter did not compel Mr. Kramer to do so or appear and testify.
25 *Id.* (“The Committee did not require the personal attendance of Mr. Kramer in this case.”).

1 **E. What Issues Under the United States Constitution Are Raised by the DCMS Letter?**
2 **(Question 3(d))**

3 Facebook does not believe that the correspondence between Mr. Kramer and the DCMS
4 Committee—which Mr. Kramer initiated—directly implicates any issues under the United States
5 Constitution. Contrary to Six4Three’s assertion, Mr. Kramer’s due process rights under the United States
6 Constitution were not infringed and he has not been denied the “right to be heard.” 643 Br. at 12–13.
7 Mr. Kramer has every right to be heard by this Court, and indeed will be heard at the hearing scheduled
8 for this Friday, November 30, 2018. *See* November 27 Order at 2.

9 And although it does not implicate his due process rights under the United States Constitution,
10 under established procedures of the U.K. Parliament, before actually being found in contempt, Mr.
11 Kramer would have been given an opportunity to present his arguments before the House of Commons
12 Committee on Standards and Privileges (the “Committee of Privileges”) had he chosen to comply with
13 this Court’s orders. Gordon Decl. ¶ 19; Miller Decl. Ex. 4 (Letter from Brasted to Speaker’s Counsel
14 (Nov. 27, 2018)); *id.* Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)) & Ex. 5 (Letter from Collins
15 to Kramer (Nov. 21, 2018)).³ There is no evidence that Mr. Kramer or Six4Three’s counsel consulted
16 counsel in the United Kingdom or did anything at all to investigate their obligations in response to the
17 DCMS Committee’s request and this Court’s orders (other than Mr. Kramer, a non-lawyer, allegedly
18 Googling parliamentary procedure). *See* Kramer Decl. ¶ 15.

19 **F. What Are the Obligations of the Court Where a House of Commons Committee**
20 **Orders the Release of Documents in Contravention to the Court’s Orders? (Question**
21 **3(e))**

22 Facebook does not believe that the Court has any particular obligation where a select committee
23 of the House of Commons orders the release of confidential documents in contravention of the Court’s
24 orders. As discussed above, the orders of a select committee of Parliament have no legal effect in the
25 United Kingdom’s courts of law, let alone in federal and state courts of the United States. And as the
26 DCMS Committee agrees, its actions did not overrule or otherwise implicate this Court’s prior orders,
27 nor did it deprive this Court of its authority to enforce its orders. *See* Miller Decl. Ex. 2 (Letter from
28

³ A discussion of the parliamentary practice on contempt proceedings is below.

1 Speaker's Counsel to Kramer (Nov. 23, 2018)) at 2. For that reason, and the reasons addressed above,
2 Six4Three's reliance on "the judicial principle of international comity" is again misplaced.

3 **G. What Are the Procedures for Mr. Kramer, Who [Was] Visiting the United Kingdom**
4 **on Business, to Respond or Object to the DCMS Letter Demand? (See Ex. 1.)**
5 **(Question 3(f))**

6 Although there are no express provisions for a person directed by an order of a select committee
7 to respond or object to such an order, modern practice would allow such a person to respond to an
8 investigation into whether there was a contempt of Parliament prior to the full House of Commons
9 making any finding of contempt. Gordon Decl. ¶¶ 18–19. A detailed description of contempt procedures
10 in the House of Commons is provided in response to question 3(g) below.

11 Six4Three attempts to put the onus on Facebook to "defend against disclosure of designated
12 documents in the event they are demanded under legal compulsion by a third party" with reference to
13 Paragraph 16 of the Stipulated Protective Order. See 643 Br. at 13–14. But that is not what the
14 Stipulated Protective Order says, and Mr. Kramer was not facing "legal compulsion."⁴ Paragraph 16 of
15 the Stipulated Protective Order only applies to "*a subpoena or a court order issued in other litigation*
16 that compels disclosure of any Confidential Information or Highly Confidential Information." Miller
17 Decl. Ex. 6 ¶ 16 (emphasis added). As Facebook made clear to Six4Three's counsel immediately upon
18 notice of the DCMS Committee letter of November 19, 2018, the DCMS Committee letter is not "a
19 subpoena or a court order issued in other litigation." And the DCMS Committee is not a court of law,
20 but rather a select committee of Parliament. Paragraph 16 has no application here. That said, Paragraphs
21 4 and 5 of the Stipulated Protective Order—which require prior written consent of the designating party

22 ⁴ In his original letter of November 19, Mr. Godkin raised this same provision of the Stipulated
23 Protective Order. Miller Decl. Ex. 7 (Letter from Godkin to Collins (Nov. 19, 2018)). Following the
24 subsequent correspondence from Facebook's counsel on the same day, Six4Three's counsel apparently
25 agreed that Paragraph 16 of the Stipulated Protective Order did not apply to the DCMS Committee's
26 Order. Specifically, Mr. Godkin told the DCMS Committee on November 21, 2018—the day that Mr.
27 Kramer disclosed Facebook confidential information to the DCMS Committee—that "Mr. Kramer is
28 bound by the Protective Order and has no choice but to comply with it. In addition, the attached Order
[from November 20, 2018] further prevents Mr. Kramer from transmitting, releasing or submitting
unredacted copies of Plaintiff's opposition to [motions to strike] until further order of the Court, and
provides that failure to comply will be considered an act of contempt." Miller Decl. Ex. 8 (Letter from
Godkin to Collins (Nov. 21, 2018)).

1 before protected materials can be disclosed to any person not cleared under the Stipulated Protective
2 Order—remained applicable throughout.

3 **H. What Are the Contempt Procedures for DCMS for Non-Compliance by Mr.**
4 **Kramer? (Question 3(g))**

5 The DCMS Committee does not itself enforce its orders. *See* Gordon Decl. ¶ 13; *accord* Miller
6 Decl. Ex. 2 (Letter from Speaker’s Counsel to Kramer (Nov. 23, 2018)) at 3.

7 Rather, the established procedure for enforcing an order of a select committee is as follows:

- 8 a. The select committee must first make a special report to the House of Commons.
- 9 b. The House as a whole then debates whether to refer the matter to the Committee of
10 Privileges.
- 11 c. The Committee of Privileges decides whether or not to recommend to the full House of
12 Commons that a contempt of Parliament has been established and the suggested penalty, if
13 any.
- 14 d. The full House of Commons must then decide whether to accept the recommendation of
15 the Committee of Privileges, and, if contempt is found, determine the appropriate penalty.

16 *See* Gordon Decl. ¶ 25; *accord* Miller Decl. Ex. 4 (Letter from Brasted to Speaker’s Counsel (Nov. 27,
17 2018)); *id.* Ex. 5 (Letter from Collins to Kramer (Nov. 21, 2018)).

18 Here, to the best of Facebook’s current understanding, the DCMS Committee reported Mr.
19 Kramer’s initial decision to abide by this Court’s orders to the full House of Commons, but no
20 subsequent action was taken against Mr. Kramer. *See* Miller Decl. Ex. 5 (Letter from Collins to Kramer
21 (Nov. 21, 2018)); *id.* Ex. 2 (Letter from Speaker’s Counsel to Kramer (Nov. 23, 2018)).

22 The elements of a contempt of Parliament finding have not been systematically defined. *See*
23 Gordon Decl. ¶ 26. It is not the case that *any* failure to comply with an order for production of
24 documents automatically amounts to contempt. *Id.* Rather, the House of Commons has stated that the
25 exercise of its jurisdiction should be used “as sparingly as possible” and only when “the House is
26 satisfied that to exercise it is essential in order to provide reasonable protection for the House, its
27 Members or its officers, from such *improper* obstruction as is causing, or is likely to cause, substantial
28 interference with the performance of their respective functions.” Gordon Decl. ¶ 27 (quoting Resolution

1 of the House of Commons on 6 February 1978). Here, Mr. Kramer had a compelling reason not to
2 comply with the DCMS Committee's order in that this Court had expressly ordered him not to disclose
3 Facebook's confidential materials, and that he would face contempt proceedings in California if he
4 complied. *See* Gordon Decl. ¶¶ 28–29.

5 Further, if Mr. Kramer or his counsel had taken the prudent measure of engaging counsel in the
6 United Kingdom (or had done basic diligence on the relevant rules), they would presumably have learned
7 that, although the House of Commons has the power to fine, admonish, or imprison in theory upon a
8 finding of contempt, that power has not been exercised in over *a century*. The last fine was imposed in
9 *1666*, Gordon Decl. ¶ 30, more than a century before the thirteen American colonies declared
10 independence from King George III. The last imprisonment for contempt (of a non-member of
11 Parliament) was in 1880. *Id.* Indeed, the Committee of Privileges has expressed doubt as to whether the
12 power to fine or imprison still exists. *Id.* (citing Committee of Privileges Committees' 14th Report of
13 Session 2010–2011 Privileges: Hacking of Members' Mobile Phones). Contrary to Mr. Kramer's claims,
14 he was in no imminent danger of fines or imprisonment as a practical matter, and he would have been
15 disabused of any such belief had he or counsel taken the reasonable and simple step of investigating these
16 issues before Mr. Kramer violated this Court's orders.

17 **IV. RESPONSES TO COURT'S FACTUAL QUESTIONS**

18 In its November 20 Order, the Court asked Facebook to answer two additional questions.

19 **A. Defendant Has Offices in London. Is Defendant Subject to the Jurisdiction of** 20 **DCMS?**

21 Defendant Facebook, Inc. is incorporated in Delaware and has a principal place of business in San
22 Mateo County. While the DCMS Committee does not have jurisdiction over Facebook, Inc., Facebook
23 has engaged extensively with the DCMS Committee over the course of its inquiry, answering hundreds
24 of questions, including during many hours of oral evidence by multiple senior individuals. Facebook UK
25 is located in London and therefore subject to Parliament's jurisdiction.
26
27
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1 **B. Has DCMS or Other Committee Served a Similar Demand for Unredacted Copies of**
2 **Sealed Documents on Defendant? If so, How Has Defendant Responded?**

3 At no time has the DCMS Committee requested from Facebook, or any of its subsidiaries, the
4 documents listed in its November 19, 2018 letter to Mr. Kramer.

5 Dated: November 28, 2018

DURIE TANGRI LLP

6
7 By: _____


SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM

8
9 Attorneys for Defendants
10 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
11 Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya
12 Sukhar
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1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed in San
3 Francisco County, State of California, in the office of a member of the bar of this Court, at whose
4 direction the service was made. I am over the age of eighteen years, and not a party to the within action.
5 My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

6 On November 28, 2018, I served the following documents in the manner described below:

7 **DEFENDANT FACEBOOK, INC.'S BRIEF RE: COURT'S ORDER DATED**
8 **NOVEMBER 20, 2018**

9 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
10 Durie Tangri's electronic mail system from cortega@durietangri.com to the email
addresses set forth below.

11 On the following part(ies) in this action:

12 Stuart G. Gross
13 GROSS & KLEIN LLP
14 The Embarcadero, Pier 9, Suite 100
15 San Francisco, CA 94111
Telephone: 415-671-4628
sgross@grosskleinlaw.com
iatkinsonyoung@grosskleinlaw.com

16 David S. Godkin
17 James Kruzer
18 BIRNBAUM & GODKIN, LLP
19 280 Summer Street
20 Boston, MA 02210
Telephone: 617-307-6100
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

21 *Attorneys for Plaintiff*
22 *Six4Three, LLC*

23 I declare under penalty of perjury under the laws of the United States of America that the
24 foregoing is true and correct. Executed on November 28, 2018, at San Francisco, California.

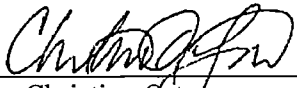
25 
26 Christina Ortega
27
28

EXHIBIT 21

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8 Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
9 Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SAN MATEO

12 SIX4THREE, LLC, a Delaware limited liability
13 company,

14 Plaintiff,

15 v.

16 FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
17 CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
18 SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
19 ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

20 Defendants.
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Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**DECLARATION OF RICHARD GORDON,
QUEEN'S COUNSEL**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

1 I, Richard Gordon, hereby declare as follow:

2 **I. QUALIFICATIONS**

- 3 1. I am a practising barrister (Queen's Counsel) with a specialist practice in constitutional and
4 administrative law. I practise from Brick Court Chambers which is a well-known constitutional
5 and administrative law, commercial law and European Union law set of Chambers in the United
6 Kingdom. I have appeared in numerous constitutional cases both in the United Kingdom and in
7 foreign jurisdictions.
- 8 2. I am also a Visiting Professor in the Faculty of Law at University College London and a member
9 of the Advisory Board of the Constitution Society UK ('the CS'). I frequently give evidence to
10 parliamentary select committees (most recently to the House of Lords Constitution Committee
11 alongside the former President of the Supreme Court Lord Neuberger on the EU (Withdrawal)
12 Bill). I was appointed as a special adviser to the Public Administration Select Committee on its
13 recent inquiry into civil service impartiality. I have written and co-authored many works on UK
14 constitutional and administrative law including, most relevantly, a paper in 2012 for the CS
15 entitled *Select Committees and Coercive Powers*.

16 **II. INTRODUCTION**

- 17 3. In this Report I address the following topics:
- 18 a. The essential nature of select committee powers and, in the light of that, whether the
19 United Kingdom courts could enforce a Select Committee's order for production of
20 documents ('Issue 1').
- 21 b. The legal effect in English law of the order for production of documents made by the
22 Committee for Digital, Culture, Media and Sport ('the Committee'), a select committee of
23 the United Kingdom House of Commons ('Issue 2').
- 24 c. The procedures for a person visiting the United Kingdom to respond or to object to the
25 Committee's order ('Issue 3').
- 26 d. The procedures available to the Committee for non-compliance with the Committee's
27 order ('Issue 4').
- 28 e. Whether Facebook is subject to the jurisdiction of the Committee given that it has offices
in the UK and is a legal entity in the UK ('Issue 5').

1 4. I have read the content of a letter dated 23rd November 2018 addressed to Birmbaum Godkin LLP
2 from the Speaker's Counsel ('the SC letter') which I infer will be before the Court. I will make
3 reference to that letter where appropriate.

4 **III. ISSUE 1: ESSENTIAL NATURE OF SELECT COMMITTEE POWERS**

5 5. There is a fundamental distinction between (i) the law, decided and enforced by the United
6 Kingdom courts (derived almost exclusively from statute, the common law and equity) and (ii)
7 the powers of a parliamentary select committee of the House of Commons (derived from internal
8 parliamentary standing orders and Resolutions of parliament).

9 6. The courts of the United Kingdom cannot inquire into what is said or done before, or by, a select
10 committee. This follows from parliamentary privilege (the most important aspect of which is
11 freedom of speech within parliament) and the wider principle of exclusive cognizance which
12 protects how parliament arranges its internal affairs from interference by the courts.

13 7. Article 9 of the Bill of Rights 1689 provides, materially, as follows:

14 *'That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or*
15 *questioned in any Court or Place out of Parlyament.'*

16 8. It is well established that select committee proceedings rank as proceedings '*in Parliament*'.¹
17 Moreover, Article 9 is part of a separate and wider principle of the United Kingdom's
18 constitutional separation of powers.

19 9. There are many statements in the case-law. For example, in *Bradlaugh v. Gossett* (1884) 12 QBD
20 271 at 275 Lord Coleridge CJ observed that:

21 *'What is said or done within the walls of Parliament cannot be inquired into in a court of*
22 *law.'*

23 10. The wider principle is exemplified by Lord Browne-Wilkinson's speech in *Prebble v. Television*
24 *New Zealand Ltd* [1995] 1 AC 321 at 332C:

25 *'In addition to article 9 itself, there is a long line of authority which supports a wider*
26 *principle, of which article 9 is merely one manifestation, viz that the courts and*
27 *parliament are both astute to recognise their respective constitutional roles.'*

28 11. As part of their respective constitutional roles:

'Exclusive cognisance is the right of each House of Parliament to regulate its own
proceedings and internal affairs without interference by any outside body. This includes
the conduct of its Members, and of other participants such as witnesses before select

¹ Paragraph 252 of the First Report of Session 1998-1999 of the Joint Committee on Parliamentary Privilege.

12. What this means is that select committee proceedings operate entirely separately from the United Kingdom legal system. It follows from this that a select committee order for the production of documents could not (and would not be sought to) be enforced by the Committee through a court of law in the United Kingdom.

13. In short, there is no process recognised in the law of the United Kingdom for enforcing the order of a select committee. As explained below, select committees may seek to enforce their orders against the person or body to whom the order is addressed by raising the issue of non-compliance as an alleged contempt of parliament. At the present time the scope of this process is uncertain and its effectiveness limited. There have been suggestions – not pursued to date – that the enforcement powers of select committees might be strengthened, although there are also concerns about doing so.

14. By the same token, if confidential documents should – either inadvertently or deliberately – be disclosed to a select committee, the respective doctrines of parliamentary privilege and exclusive cognisance place no legal constraints upon the use that a committee might make of such documents including the making public of such documents.³ The United Kingdom courts will not intervene to restrain such use and, therefore, the consequences of disclosure may be irreparable.

15. Finally, the scope of parliamentary privilege is confined to 'proceedings in parliament'. It does not extend to information used outside such proceedings even if that information was obtained during the course of such proceedings. As such, were a Member of the Committee or other person who has had sight of such documents by reason of the disclosure to the Committee to use or disclose them outside parliament and without the authority of the Committee, then that person could be susceptible to legal sanction.

² Paragraph 8 of the Executive Summary of *Parliamentary Privilege* (April 2012, Cm 8318).

³ There is, nonetheless, a self-denying ordinance of 15 November 2001, which is expressed to apply equally to committees of the House of Commons, not to refer to, or raise in any motion, debate or question, cases in which legal proceedings are active in the United Kingdom. By analogy similar principles might be thought to apply to legal proceedings that are active in the courts of the United States.

1 **IV. ISSUE 2: LEGAL EFFECT OF THE COMMITTEE'S ORDER FOR PRODUCTION OF**
2 **DOCUMENTS**

3 16. It follows from the answer to Issue 1 that as a matter of law as administered by the United
4 Kingdom courts (as distinct from the internal regulation of its own proceedings by parliament) the
5 Committee's order is devoid of legal effect.

6 17. However, this does not mean that the Committee's order has, at least in theory, no possible
7 adverse consequential effect. This is addressed in Issues 3 and 4 (below) and forms part of the
8 internal procedures adopted by parliament for the purpose of regulating its affairs.

9 **V. ISSUE 3: PROCEDURES FOR PERSONS VISITING THE UNITED KINGDOM TO**
10 **OBJECT OR RESPOND TO THE COMMITTEE'S ORDER**

11 18. As foreshadowed above, the powers of select committees of the House of Commons are laid
12 down by standing orders. The latest version (May 2018) of the standing orders makes no express
13 provision for a person affected by an order of a select committee to respond or to object to such
14 order.

15 19. Issue 4 below addresses the procedures available to the Committee for non-compliance with its
16 order. In practice, in modern times, it is inconceivable that a person made subject to an order and
17 an investigation into whether there was a contempt of parliament would not be permitted to
18 respond to the Committee's order and to make objection to it prior to the full House of Commons
19 making any finding of contempt. Indeed, as part of any proper investigation the Committee
20 would, in practice, have to give the affected person the opportunity to explain his or her non-
21 compliance before making a special report to the House of Commons. In any event, the
22 Committee of Privileges if and when the matter was referred to it would be required to afford
23 such opportunity. Erskine May's Parliamentary Practice 24 ed (2011) ('Erskine May') understates
24 the position by observing that the former practice of sometimes punishing offenders for an
25 obvious contempt without hearing them '*is unlikely to be followed any longer.*'

26 20. Although, as set out correctly in the SC letter, there is no formal procedure laid down in standing
27 orders for responding, or objecting, to the order of a select committee, the former Committee on
28 Standards and Privileges (now the Committee of Privileges) would, it is now clear, before making
any recommendation to the full House of Commons as to the existence of contempt and penalty
afford the affected party the full opportunity of being heard.

1 21. This is because the Committee of Privileges set out in its minutes for 3rd July 2012 the procedure
2 that it would expect to follow in the particular reference made to it. It is reasonable to suppose
3 that this procedure would be, and is expected to be, followed more widely.

4 22. The relevant extract from these minutes are appended to this Report but the key elements are as
5 set out below. In terms of process and prior to the Committee of Privileges reporting a finding of
6 contempt and suggested penalty to the full House of Commons:

7 (i) Written evidence would be sought from the recipient of the complaint.

8 (ii) There would also be the opportunity to give oral evidence accompanied if requested by a
9 legal adviser.

10 (iii) Final submissions would be invited.

11 (iv) If it was intended to criticise the subject of the inquiry a warning letter would be sent.

12 23. It follows that the compulsory power of seizure of documents by the Serjeant at Arms that I
13 understand to have been exercised by the Committee before there was any finding (or even
14 complaint) of contempt fell outside the scope of the above procedures.⁴ I have read a further
15 letter from the Speaker's Counsel dated 27 November 2018 addressed to Hogan Lovells
16 International LLP (solicitors acting for Facebook in the United Kingdom) which appears to draw
17 a parallel between the fact of the commission of a crime with the fact of commission of a
18 contempt of parliament. However, in both cases, it is (respectively) the verdict of a criminal court
19 or the finding of a contempt of parliament by the full House of Commons that determines whether
20 (as the case may be) a crime or a contempt of parliament has occurred. In the present case there
21 has, as the letter makes clear, been no finding of contempt of parliament. Nor does it follow that
22 because non-compliance with the order of a select committee may constitute a contempt of
23 parliament, the fact of non-compliance with such order amounts to a contempt of parliament. I
24 should add that parliament has no authority, enforceable in the United Kingdom courts, to detain
25 a foreign national who has not been charged, still less convicted, of a criminal offence. Nor is
26 there any precedent for the purported exercise of such a power.

27 24. There is a material relationship between Issue 3 and Issue 4 to which I now turn.

28 ⁴ See report in the Guardian 24 November 2018 'Parliament seizes cache of internal Facebook papers.'

1 VI. ISSUE 4: PROCEDURES AVAILABLE TO THE COMMITTEE FOR NON-
2 COMPLIANCE WITH ITS ORDER

3 25. Non-compliance with a select committee's order for production of documents is capable of
4 amounting to a contempt of parliament.⁵ The established process prior to the enforcement of an
5 order of a select committee of the House of Commons is as follows.

- 6 a. The select committee must first make a special report to the House of Commons.⁶
7 b. The House as a whole then debates whether to refer the matter to the Committee of
8 Privileges.
9 c. It is for the Committee of Privileges to decide whether or not to recommend to the full
10 House of Commons that a contempt of parliament has been established and the suggested
11 penalty (if any). As the Joint Committee on Parliamentary Privilege argued in its Report
12 in July 2013, this is a safeguard to ensure that complaints of contempt are considered
13 fairly.
14 d. The full House of Commons must then decide whether to accept the recommendation of
15 the Committee of Privileges and find a contempt and, if so, to decide on the appropriate
16 penalty.

17 26. The constituent elements of contempt of parliament have not been systematically defined.
18 Although the SC letter correctly cites Erskine May (at page 839) as listing disobedience to an
19 order of a committee as a contempt of the House, that presents an incomplete picture in that it
20 implicitly suggests that any failure to comply with an order for production of documents amounts
21 automatically to contempt of parliament. This is very far from being the case.

22 27. The most recent and authoritative exposition is that set out in the Resolution of the House of
23 Commons on 6 February 1978 (see Erskine May at page 218),⁷ namely that the House has
24 decided that:

25 *'... its penal jurisdiction should be exercised (a) as sparingly as possible, and (b) only
26 when the House is satisfied that to exercise it is essential in order to provide reasonable
27 protection for the House, its Members or its officers, from such improper obstruction as is
28 causing, or is likely to cause, substantial interference with the performance of their
respective functions.'* (underlining added).

29 ⁵ The SC letter correctly states that the Committee's letter differs from a summons in that it is not issued
30 by a court. Nonetheless, normally a letter is followed by a committee 'summons'. The difference is
31 probably semantic, however, given that an order is claimed to have been published.

32 ⁶ See, generally, Erskine May at pp. 278-279.

33 ⁷ It is also recorded in the Minutes appended to this Report.

1 28. The use of the word 'improper' is incompatible with the existence of a reasonable excuse for non-
2 compliance. Moreover, the presence of a reasonable excuse as permitting non-compliance with an
3 order made by a select committee for production of documents was expressly envisaged in the
4 2012 Government Green Paper (CM 8318) on Parliamentary Privilege (at paragraph 160) and in
5 the 1999 Joint Committee Report on Parliamentary Privilege (at paragraph 264).⁸

6 29. The Green Paper (at paragraph 160) gives an illustration of this:

7 *'... While it would be up to the House to determine what constitutes a reasonable excuse,
8 the risk of self-incrimination might be one, limiting the degree of compulsion required...'*

9 30. In terms of penalty, in theory the House has power to fine, to imprison or to admonish for an
10 established contempt. However, the last fine was imposed in 1666. The last imprisonment for
11 contempt of a non-member was in 1880.⁹ The Standards and Privileges Committee in its 14th
12 Report of Session 2010-2011 Privileges: Hacking of Members' Mobile Phones doubted whether
13 these latter powers (fining or imprisoning) still existed (see paragraph 59). As mentioned earlier,
14 there have, over the years, been proposals to strengthen the enforcement powers of select
15 committees but no reforms have yet been implemented or even unequivocally suggested.¹⁰

16 31. One of the concerns in strengthening (or even now exercising) the powers of select committees
17 has been an awareness of the importance attached to the protection of fundamental rights and a
18 consequent fear of a successful legal challenge. As the Joint Committee on Parliamentary
19 Privilege recognised in its 2013 report (see paragraph 51) *'[w]hile domestic courts may be unable
20 to consider proceedings in Parliament, the European Court of Human Rights has asserted its
21 jurisdiction, relying on Article 6 of the European Convention on Human Rights which provides
22 for the right to a fair trial "by an independent and impartial tribunal"'*.

23 VII. ISSUE 5: WHETHER FACEBOOK IS SUBJECT TO THE COMMITTEE'S 24 JURISDICTION

25 32. A select committee's power to make an order for production of documents within its jurisdiction
26 provided that such documents are relevant to the Committee's work as defined by its terms of
27 reference is, in principle, unconstrained by the House's relevant standing order 152(4) which
28

⁸ Parliamentary Privilege First Report Session 1998-99.

⁹ See *Disciplinary and Penal Powers of the House* Fact Sheet G6 General Series of the House of Commons Information Office (September 2010) at page 6.

¹⁰ See, most recently, Joint Committee Report on Parliamentary Privilege, Report of Session 2013-2014 (18 June 2013) at paragraphs 57-100.

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enables the Committee *'to send for persons, papers and records.'* This is confirmed by Erskine May (at page 819).

33. As a legal entity within the United Kingdom Facebook is, therefore, potentially subject to the Committee's jurisdiction and to the processes, including the limitations on those processes, set earlier out in this Report. Only legal and natural persons that reside or who are present in the United Kingdom are within the jurisdiction of the United Kingdom parliament. This would include Facebook's United Kingdom entities. Facebook Inc which is the party to the Californian proceedings and, as I understand the position, the relevant entity to whom the documents belong, is not present in the United Kingdom and is not, therefore, subject to the jurisdiction of the United Kingdom parliament.

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 28th day of November, 2018

